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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JAMES W. GREEN, pro se, Petitioner

v.

PRIMERICA DISABILITY INCOME PLAN

(John Hsu, Trustee)

COMMERCIAL CREDIT CO.,

AND COMMERCIAL CREDIT CORPORATION

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Must a District Court, and a Court of Appeals on review, address and *yield* to, nonmoving parties *specification* of a moving parties *default* answers to Requests for Admissions, which "*conclusively established*" under FRCP 36(b) the existence of multiple limitations fact issues, thereby precluding summary judgment under the Supreme Court's *Celotex v. Catrett* ?

2. Where a Court of Appeals does not address the soundness of the District Courts reasons for summary dismissal, but seizes upon an independent basis for affirmation, and when they rely exclusively upon evidence extant in the record, but *first specified by Defendant on appeal*, a certain *letter* neither addressed by the trial court, nor there by the briefs or pleading's of either party, do they depart from the Supreme Court mandate in *Fountain v. Filson*?

3. Is there a sufficiently clear inference that the Court of Appeals improperly perceived ERISA Sec. 510 *multiple* prohibition's as a single indivisible offense, and not subject to distinct and disparate proofs, for Discovery Rule purposes?

4. Should a defendant occupying that tripartite role as "discharging" Employer, Named Fiduciary and Plan Administrator *(and whose Chief Investment Officer is Plan Trustee)*, be held subject to the "principles of trust law" under Sec. 510/511, using the analysis of the Supreme Court in *Firestone v. Bruch*? Were they thus compelled by the Loyalty Rule, within the statutory limitations period, to declare *with unmistakable clarity* their intent to *"interfere"* (solely for discharge-based reasons, and only after the discharge itself is barred by limitations) with beneficiaries ERISA rights?

5. Should the District Court and the Court of Appeals have placed the burden upon Defendant, as mandated by the Texas Supreme Court's *Burn's v. Thomas*, that "a Defendant seeking summary judgment must *prove* when the cause of action accrued and must *conclusively negate* the discovery rule", by compelling they *prove*, rather than merely assert, the discovery of a *then* fully *actionable* (vis a vis *a non-actionable*) claim ?

6. Did the Courts of Appeals uncontested finding of an initial July 15, 1990 denial of contractually due benefits *(a "discovery" only thereupon actionable under Sec. 502(a) (1)(B))*, for discharge-based

reasons, and their imposition of the discovery rule thereto, compell simultaneous application of that identical manifestation date to the Sec. 510, discharged-based, "*purpose* to interfere" charge, a *"purpose"* that only manifested itself *with* that denial, and which *only then* became actionable under the 5th Circuits *Clark* decision?

7. Taking as proper the Court of Appeals inference (Question 2&3), that the letter supported early recognition of a (*presumably actionable Part #2)* Sec. 510 action, should the court have at that point addressed *(and yielded, since it is a question of fact, and state of mind issue)* to beneficiaries assertion that he *even yet* succumbed to Respondents Sec. 511 representations (*made subsequent to the letter, and well supported by the record as fraudulent)* that the purpose of his discharge *was not* to defeat benefits, causing him not to pursue his Sec. 502 and 510 action timely?

8. (a) When one or more Federal Circuit's *(as in the 5th Circuits Clark v. Resistoflex)* consistently dismiss *premature* Sec. 510, Part #2, action's at *any* point in time when "*it is undisputed that no benefit will be forfeited by reason of (the) discharge*", should not the court liberally apply the discovery rule when a subsequent, post-limitations, discharge-based "forfeiture" is declared?

(b) May the Court of Appeals, by summary judgment, consistently treat "state of mind" issues for ERISA litigants disparately (as in *Clark)* vis a vis *"state of mind"* issues of *non*-ERISA litigants *(International Shortstop v. Rally's)*?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, James W. Green, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on June 28, 1993. Petition for Panel Rehearing was denied August 12, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was not reported, but is reprinted in the Appendix (p79).

The memorandum decision of the United States District Court for the Northern District of Texas, Dallas Division (Maloney, Robert) has not been reported. It is reprinted in the Appendix here to, p89.

JURISDICTION

Invoking federal jurisdiction under the Employee Retirement Income Security Act of 1974, 29 USC §§1001, et seq. (ERISA) the petitioner brought this suit in the Northern District of Texas on December 13, 1991. On May 5, 1992, the District Court, granted the respondents Motion for Summary Judgment, based upon the Statute of Limitations. On May 13, 1992 Motion for Reconsideration under FRCP 59 was struck as not in compliance with Local Rule 5.

On petitioners appeal, the Fifth Circuit on June 28, 1993, reversed and remanded the ERISA Sec. 502(a)(1)(B) count. On a basis independent of the District Court's, the Sec. 510/511 dimissal was affirmed. See p89, *infra.*

Petitioner's Petition for Panel Rehearing was denied August 12, 1993. See Appendix, p92.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 USC § 1254.

STATUTE'S INVOLVED

29 USC § 1001, et seq. *Employee Retirement Security Act of 1974*

The "pertinent text" is set forth in the Appendix (p98) in accordance with Rule 11(f).

Federal Rules of Civil Procedure

The "pertinent text" is set forth in the Appendix (p96).

STATEMENT OF THE CASE

PRELITIGATION - August 7, 1987, Beneficiary was blinded in his right eye, at work, from a retinal hemorrhage. He told his employer he believed it to be caused from unusual lifting of a heavy file box there. September 2, 1987 he was fired, ostensibly for performance reasons. He had worked 19 of his 50 years for Gulf Insurance, a corporation wholly owned by Defendent, Commercial Credit.

He was able to obtain other work *only* by concealing his loss of sight, his long term bilateral hearing deficit, and the severe anxiety and psychological depression caused by his blindness and firing. He received, then, no accomodations for those sensory and psychological disability's during this most crucial part of his self rehabilitation.

He could not avail himself of the formal rehabilitation pro-

visions of the Commercial Credit's Long Term Disability benefits program (Art. 2.16 (iii) *"Assistance with disabled Participant's rehabilitation"*), for it could only be applied in the context of his former job, and within the Commercial Credit's organizational structure.

His new work environment was unforgiving, and often hostile, to his disability's. His psychological state continued to deteriorate, as did his performance. In less than two years he was again jobless. The Social Security Administration found him permanently disabled, which except for his firing, might have been avoided.

During the first few months following his discharge from Gulf, Beneficiary had written Commercial Credit three times about benefits to assure himself that his benefits would be "waiting" for him if his self-rehabilitation failed.

Three times they responded without declaring their intent to ultimately (*after limitations barred him!*) deny benefits based upon his discharge. He was sent, by Commercial Credit's admission, "claim forms and *(benefit)* informational materials" (Appendix, p105).

Commercial Credit deducted "premiums" for disability coverage from his salary (which was continued for 60 day's after his firing), and paid ERISA medical benefits for his retinal hemorrhage.

When he lost his "rehabilitative" employment he made formal claim for benefits. Commercial Credit, now for the first time, two

and a half years postdischarge, repudiated benefits solely for discharge-based reasons *("All coverage***ends at midnight on the last day of active employment"*.

The two year limitations period controlling discharge, for "purpose of interfering", under ERISA 510 had run.

THE DISTRICT COURT PROCEEDINGS - Beneficiary brought this action against the Plan Trustee for contractually due benefits under ERISA, Sec. 502(a)(1)(B). He charged Commercial Credit, who had exclusive control of terminations, with "discharge*** for the *purpose* of interfering with the attainment of*** rights" *(Sec. 510, Part #2)*, and fraudulent concealment of that "purpose" until Beneficary was barred by limitations *(thus invoking Sec. 511)*.

Commercial Credit sought summary judgment. They only nominally addressed limitations, and not at all Beneficiary's invocation of the discovery rule, their fraudulent concealment in a *fiduciary capacity*, nor their default answers to Admissions which demonstrated multiple limitations fact issues.

They emphasized, instead, a res judicata bar, citing summary dismissal (as barred by limitations) of earlier litigation against Gulf. There Plaintiff *timely* sought various non-ERISA wrongful discharge remedies. When the manifest "purpose" of his discharge was divulged he amended to include that offense. Commercial Credit there

controlled the entire defense of its subsidiary. The court dismissed the Gulf action because service was not had timely.

In the *present* action Commercial Credit moved to substitute the Plan Trustee as defendant in the Sec. 510 count. Beneficiary objected that the Plan had no authority in employment termination decisions, and cited case law holding substitution improper. The District Court, without opinion, ordered substitution.

Beneficiary had *specified* reliance upon a number of Commercial Credit's default answers to Requests for Admissions ("The Admissions") that "conclusively established" (FRCP 36(a)(b)) multiple limitations fact issues precluding summary judgment. The Court dismissed the entire action (both the contractually based benefits, and the wrongful discharge counts), citing the Gulf litigation:

> "***this court dismissed that action***(as)* barred by*** two year statute of limitations ***this action is *similarly* barred***".

Commercial Credit's res judicata arguments were presumeably unpersuasive. The court denied "all other relief", and from that order Defendant did not appeal. The District Court did not address "The Admissions". Neither did they address Beneficary's proof of fraud, or pleading's invoking the discovery rule, nor defendants duty under the Loyalty Rule to disclosure all material facts.

THE APPEAL TO THE 5TH CIRCUIT - Beneficary's Brief to the 5th Circuit Court of Appeals again raised the discovery rule and asked that the court deem any exceptions waived. His Reply Brief also objected when Commercial Credit, now for the first time on appeal, attempted to raise exceptions to the Rule. Plaintiff again *specified* "The Admissions" as compelling reversal.

The Court of Appeals agreed that the contractually due benefits count was subject to a four (4) year statute of limitations, vacated and remanded the Sec. 502 (a)(1)(B) count, after finding the *initial* discharge-based denial date to be July 15, 1990.

The 5th Circuit also reversed the substitution, but then rendered it moot by affirming the District Courts limitations-based dismissal.

The Court of Appeals did not address the basis for the District Courts dismissal, which would infer they found it unsound. Instead they affirmed on an "independent basis" relying exclusively upon Beneficary's letter of September 15, 1987 ("The Letter").

Written only day's after his discharge of September 2nd, following a meeting with his Employer, Beneficary presented there a "laundry list" of *potential* actions. While it appeared in the District Court Record, Commercial Credit did not *specify* reliance upon any portion of that seven page letter at the District Court level. On

appeal, however, *at Commercial Credit's urging*, the Court seized upon this brief passage as "*discovery*":

> "***we also touched upon *other* remedies potentially available to me including *discharge****at least in part *for insisting upon rights to certain benefits".*

The courts ruling of a July 15, 1990, discovery *(i.e. denial for discharge-based reasons)* of the Sec. 502 (a)(1)(B) action is uncontested. That is now the law-of- the-case! Without despute, for two and a half years, Commercial Credit did not divulge their intent to deny benefits for discharge-based reasons.

Yet the court, in a ruling inconsistant with the Sec. 502(a)(1)(B) resolution, found that September 15, 1987 *(the date of* "The Letter"*)* was the date Beneficary discovered a *(presumably actionable, Part #2)* Sec. 510 claim. That was, as will be seen, contrary to "The Admisions" as well.

> Green contends that we should apply a discovery rule in determining when his section 510 claim accrued***claims that he was not aware that he was terminated to avoid payment of ERISA benefits until more than two years after his termination, at which time he was informed that his application for benefits would be denied based upon that termination contends that throughout that period Commercial Credit led

him to believe that his benefits claim still could be ("would be"! See Brief !) considered on its merits there by preventing his discovery of the improper cause for his termination***a close look at the record *("The Letter")* proves it to be without merit.

In his Petition for Panel Rehearing he pointed out the incongruity of the courts reasoning. The letter had conjectured that (among many alternative wrongful discharge, and miscellaneous offenses) he had been fired because he "*insisted on his rights*" to benefits. Those "benefits" included *Workers Compensation* an expression the court *omits* from its opinion.

That statement, at best, imparts the essential meaning of Sec. 510's Part #1 *("for exercising any right")*. The court either equated Beneficiary's early conjecture with a recognition that he was *"terminated to avoid payment of benefits"* (the Part #2 offense for which he *ultimately* sued), or of a broad, all encompassing, Sec. 510 breach.

Plaintiff had *never* sued for the conjectural Part #1 offense of "discharge***for exercising any right" *(Appendix p102)*.

The 5th Circuit was unmoved and denied the Motion for Panel Rehearing without comment. Having no other recourse Plaintiff seeks Certiorari.

REASONS FOR GRANTING THE WRIT

1. Must a District Court, and a Court of Appeals on review, address and *yield* to, nonmoving parties *specification* of a moving parties *default* answers to Requests for Admissions, which "*conclusively established*" under FRCP 36(b) the existence of multiple limitations fact issues, thereby precluding summary judgment under the Supreme Court's *Celotex v. Catrett*?

Commercial Credit candidly admits that "it appears that the Trial Court did not rely upon, *or consider*, these *purported* omissions" (Appendix p109). "Fair hearing" issues abound!

In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case, and *must consider all papers of record* as well as any materials prepared for the motion. 10A *Wright* §2721, p44; *Celotex*, supra, FN 2, at 330. *Trevino v. Celanese*, 701 F2d 397, 406-07 (5th Cir. 1983).

The Supreme Court in *Celotex Corp. v. Catrett*, 477 US 317, 324 (1986), speaking broadly to any evidence that might be offered in opposition (FRCP 56(c)) (Appendix, p98) to summary judgment, offered this:

> *We do not mean* that the nonmoving party must produce evidence in a form that *would be admissible at trial* in order to

avoid summary judgment (324)***respondent made an adequate showing, albeit possibly not in admissible form (338).

Both courts below were also in conflict with the 8th Circuit's ruling in Diamonds Plus v. Kolber, 960 F2d 765, 768, (1972) that discovery:

"***need not be admissible at trial in order to be properly be considered in opposition to a motion for summary judgment.

The principle that only *admissible* evidence might be used in disposition of the motion "was called into doubt by *some brief language* a 1986 Supreme Court case (Celotex) used in remanding to the appeals court". *Steven Childress & Martha Davis*, Federal Standards of Review, at §5.02 (1992). "*perhaps* freeing up the use of certain inadmissible materials***majority opinion's indication, *made almost in passing*****this leaves a further *ambiguity*****though *most courts appear to ignore* this *apparent* direction to consider inadmissible evidence". *Childress*, at §5.04.

Others do address the issue, with wide-ranging results. *Nelken*, 40 Hastings L.J. at 77-81.

There is conflict, for instance, in the 11th Circuit. Offshore *Aviation v. Transcon Lines*, 831 F2d 1013, 1016-17 (1987)(law remains settled that *only admissible evidence may be considered*).

We have here, as in the Supreme Court's Rule 10(.1.)(c), a circumstance in which a "United States court of appeals has decided an important question of federal law *which has not been, but should be*, settled by this Court, or (depending upon how one interprets *Calotex*) has decided a federal question in a way that conflicts with applicable decisions of this Court.

The Federal Rules specifically allow *(such)* to be used in opposition to motions for summary judgment (FRCP 56(e))".

The 8th Circuit cites *Wright & Miller, Federal Practice and Procedure* 2142 (1970)(footnote omitted); and *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 966 (9th Cir. 1981) that such discovery:

"***should be usable***even though the conditions of the rules for use***at trial are not satisfied".

Individual panels of 5th Circuit Court of Appeals, with what seems

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Over seven years have passed since the "trilogy", and yet confusion reigns. This is a case involving a prior Supreme Court opinion whose implications are in need of clarification. *SEC v. United Benefit Life*, 387 U.S. 202, 207 (1967). See also *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 300 (1976) *appeared* to implicate prior decision). Certiorari granted "because of the discordant views in the circuits regarding the proper application of two prior Supreme Court decisions".

See Federal Summary Judgment, *The "New" Workhorse for an Overburdened Federal Court System*, 20 U.D.C. L. Rev. 955 (1987). In the 5th Circuit's 1980-81 court year 26 active judges shared 4400 appeals; in the 1992-93 year 16 justices handled 6700 cases (10 5th Circuit Reporter 1046). Is this part of the problem?

Are *pro se's* burdensome Due Process requirements, and strained judicial resources, simply incompatible? Have they fallen victim to a form of judicial "triage" in which those who cannot obtain legal representation are simply *not treated* in the District Court, *nor resuscitated* on appeal?

unchecked autonomy, have often demonstrated disturbing inconsistency. Their rulings have conflicted with other panels, over brief periods, in their resolution of crucial summary judgment elements.

Only last year a 5th Circuit panel *(Jones, Duhe, and Wiener)* has acknowledged, that having considered the evidence (*including* "admissions" specifically, citing *Celotex*), *we must* "review the facts

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Error then begets error! As will be treated elsewhere the Court then erroneously interpreted both the inferences to be drawn from "The Letter" *("the drawing of legitimate inferences from the facts" forbidden them by Anderson, at* 251; *Adickes, at* 158)) , and the *multiple* prohibitions of ERISA Sec. 510, in affirming dismissal.

In determing whether to grant certiorari this court observed in *Stencel Aero v. United States*, 431 U.S. 666, 669 n. 6 (1977) that the circuits "have been far from uniform in their treatment of this issue" and that certain circuits had taken positions "which appear inconsistent with" the view of other circuits".

Scarborough v. United States, 431 U.S. 563, 567 n. 4 (1967)("split among the circuits", one circuit being noted as having an *intra*circuit conflict).

Commissioner v. Estate of Bosch, 387 U.S. 456, 457 (1967) (*Intra*circuit conflict relates to a recurring and important issue, accompanied by a "wide-spread conflict among the circuits"). There are other such cases!

The "threshold" policy "of letting *tolerable* conflicts go unaddressed until more than two courts of appeals have considered a question" has been satisfied. Justice Brennan, *Some Thoughts on the Supreme Courts Workload*, 66 Juciature 230, 233 (1983).

drawing inferences most favorable to the party opposing the motion". *Sims v. Monumental General Ins. Co*, 960 F2d 478 (5th Cir. 1992).

This panel (*Politz, King and Barksdale*), however, has clearly treated the *moving party* in the "most favorable light" (as will be demonstrated in subsequent Questions, as well). It has given them "benefit of *(unreasonable)* inferences", in this, and *other* aspects.

Plaintiff, with the due diligence, served two (2) sets of Requests for Admissions upon Defendant February 18-20, 1992, (Interrogatories, and Motion to Produce were also served). Service was had under FRCP Rule 5(b) by mailing them First Class Mail to Defendants counsel of record. A Certificate of Service was executed. Defendant answered none of the discovery, but filed for Summary Judgment instead.

In his Response to Defendants Motion for Summary Judgment

Celotex, at 322, said *(by inverse reasoning)*, the district court should *(only)* grant summary judgment "*In our view****after adequate time for discovery***, and *directly* at 326 that "Rule 56(f)***allows a summary judgment motion to be denied***if the nonmoving party has not had an opportunity to make *full* discovery".

Because a *pro se's* ability to prosecute his own action is frequently (if not invariably) "learn as you go" they are particularly vulnerable to the early *blitzkrieg* of summary judgment, and abuse of the process, without special safeguards by the courts.

(Appendix, p105) Plaintiff "set forth specific facts" (i.e. designated certain default answers to Requests for Admissions) showing that there was a genuine issue for trial as required by FRCP Rule 56(e).

The District Court did not address "The Admissions" in any manner, even though their admissibility had not been refuted (*nor even addressed*) by Defendant's Motion for Summary Judgment.

> "Here, as there, the plaintiff responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party" (*Celotex*, at 337, Justice Brennan, with whom The Chief Justice and Justice Blackmun join, dissenting, citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970)), "consequently, here, as there, summary judgment should be denied on the ground that the moving party failed to satisfy its *initial* burden of production".

Without directly referring to "The Admissions", but mimicking the brief's reference to them, the court stated in part:

> He contends that throughout that period Commercial Credit let him to believe that his benefits claim still could be ("would be"! See Brief!) considered on its merits thereby preventing his discovery of the improper cause for his discharge.

Implicit in the Courts use of Appellants phraseology is the idea that, *if*

that contention was not discredited, it would defeat summary judgment. Before the court were request's #39 and #40 of the Admissions directly refuting the courts ruling, and going to the court's explicit reasons:

> The letters written him would not have caused a reasonable person situated as plaintiff to believe that there existed an intent by defendant to deny benefits based upon loss of employee status (RFA #39), and such a person would have only believed that his claim would ultimately be decided on its merits (RFA #40).

The Court of Appeals instead relied solely upon "The Letter" which was by no legal standard a judicial admission. Defendant did attempt to refute "The Answers" by Motion for Leave to File a Reply Brief, which was denied because the Court "previously denied Primerica's underlying motion for summary judgment and has dismissed this action". But at that point Defendant unwisely rested!

Celotex, infra, at 337, suggests that Defendant was already too late. A moving party who fails to *specify* sufficient evidence, and present argument, at the "*first tier*" that no genuine issue of fact exists, fails to do so *at his peril.*

Under the Local Rules5.1(f) a Reply to nonmoving party's Response may *not* presented as *a matter of right* but rather "in the discretion of the Presiding Judge***if permission is sought immediately****"*(it was here denied!).*

The party has "waived its arguments not presented below". McDonald v. Board of Mississippi Levee Commissioners, 832 F2d 901, 909 (5th Cir. 1989). Asking the District Court to reopen the matter, offered as much peril as promise, but Defendant might have avoided the impact of the Admissions by resort to FRCP Rule 36:

> (b) EFFECT OF ADMISSIONS. Any matter admitted under this rule *is conclusively established* unless the court *on motion permits withdrawal****.

Appellant had satisfied the evidentiary requirements *far beyond* that needed to defeat summary judgment. The limitations fact issue's were "*conclusively established*" (FRCP 36(b)) :

> "****the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is *not required to be* resolved *conclusively*****". *First National Bank of Arizona v Cities Service*, 391 US 253, 288-289. *Anderson v. Liberty Lobby*, 477 US 242, at 212 (1986).

Defendant might also have asked the District Court to rule that the

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It is not enough to say that the decision was unreported, and that it is thus improbable that it will be utilized as precedent. Therein lies a clear and present Due Process danger for *(particularly pro se)* litigants in the 5th Circuit. It means that another such *unreported* decision, under the same or similar circumstances, and then yet other's *into infinity* may be rendered.

Requests for Admissions were never served *(i.e. never mailed, or mailed to a wrong address)*. But even that presents a disputed fact issue precluding summary judgment. Further, the court was not permitted to consider that issue for other reasons. See *Anderson*, at 211:

> Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry since materiality is only a criteron for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those (*factual*) disputes.

Both the District Court and the 5th Circuit Court of Appeals were *compelled* by FRCP Rule 56(c) to give effect to the default "Admissions", and at least declare a disputed fact issue precluding summary judgment.

A suggestion for *en banc* rehearing as a means of resolving even the 5th Circuits criteria of "precedent-setting error of exceptional

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The *Second* Circuit has described the en banc procedure as "***unwieldy *** that can ill be afforded at a time of burgeoning calendars", and has announced that they will not hear such a case if it is "of such extraordinary importance that we are confident the Supreme Court will accept *(certiorari)*". *Green v. Santa Fe Industries*, 533 F. 2d 1309, 1310 (1976). The Supreme Court *did accept certiorari* and decided the case on its merits, at 430 U.S. 462 (1977).

public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent" is strongly discouraged (L. R. 35.1) "Caution***not favored***serious call on limited judicial resources" and demonstrably futile ("The most abused prerogative***only .005%***are reheard *en banc****most***initiated (*by a judge*) independent of any suggestion").

Such decisions by the Court of Appeals may go without challenge even by Motion for Panel Rehearing. But, almost certainly such decisions will go without notice to the Supreme Court so that it

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Truly *pro se* (i. e. *non*-forma pauperis) applications have become a distinct minority. *Stern*, at p425. When one has been "stonewalled" on both law and evidence in the courts below it is difficult to visualize justice above.

See also Issacharoff & Lowenstein, Second Thoughts About Summary Judgment, 100 Yale L. J. 73, 92 (1990)(statistics and cases since 1986 indicate continuing and indeed ***expanded imbalance of use***: "Summary judgment is a defendant's motion."). Issacharoff, at 94-114 (using economic model to predict that ***new standards shift wealth to defendants*** and may not achieve primary purpose of reducing litigation).

The Court has frequently deferred to those (***petitions***) coming from litigants acting under the 'constraints of economic influences and legal advice'***such cases "can generally be disposed of by the Court with less expenditure of time than those [prepaid cases] on the ***docket. Stern, Gressman, & Shapiro §8.1, p426, citing Justice Harlan, A Glimpse of the Supreme Court at Work, 11 U. Chi. L.S. Rec. 1, 7 (Spring 1963).

may "exercise *(its)* power of supervision" under Rule 10 *(Rules of the Supreme Court)*.

The chilling effect, created by the statistical improbability that the Supreme Court will grant Certiorari, deters even the most determined *represented* parties. *Pro se* litigants recognize acutely, that aside from their underdeveloped legal ability, that their argument (however well supported), lack's the intrinsic credibility of a licensed practitioner's. That one appearing "pro se" should challenge such rulings, or that they should prevail, is unthinkable, and upon that the legal departments of corporate ERISA employers strongly rely.

These issues raise the *"special and important reasons"* of Rule 10(.1.) for granting certiorari, issues *already* acknowledged by the Supreme Court as so "*special and important*" that they sought earlier to lay them to rest in *Celotex* and *Anderson*. It involves a decision in "a federal case (ERISA)", contrary to the explicit statement of FRCP Rule's 36 and 56(c), "***that conflicts with ***decisions of this Court" Rule 10(c).

It is also "in direct conflict with the decision of another U.S. Court of Appeals on the same matter" *(Rule 10(a))*, and is one in which a court of appeals has "so far departed from the accepted and usual course of judicial proceedings, *or sanctioned such a departure by a lower court*, as to call for exercise of this Court's power of

supervision" *(Rule 10 (a)).*

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2. Where a Court of Appeals does not address the soundness of the District Courts reasons for summary dismissal, but seizes upon an independent basis for affirmation, and when they rely exclusively upon evidence extant in the record, but *first specified by Defendant on appeal*, a certain *letter* neither addressed by the trial court, nor there by the briefs or pleading's of either party, do they depart from the Supreme Court mandate in *Fountain v. Filson*?

Only in Appellees Response, but *not at all* before the District Court, did Defendant address the discovery rule, or its exceptions.

Rather the Court of Appeals adopted, *at Commercial Credit's urging*, evidence ("The Letter"!) which Defendant *first specified* in their appeals brief, as establishing prelimitations discovery, and an independent ground for affirmance.

Neither did the Court of Appeals address the District Courts rationale for dismissal (reached *obviously* without argument of discovery rule exceptions by Commercial Credit!).

In *Fountain v. Filson*, 336 US 681 (1949), the Supreme Court said in salient part:

***here the order was made on appeal on a new issue as to

which the opposition had no opportunity to present a defense before the trial court***deprived of any opportunity to remedy the defect which the appellate court discovered in is

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As a subset, does a Court of Appeals, by assuming a role as "surrogate" trial court, abuse their discretion by placing themselves in the untenable position of reviewing the propriety of their own decisions, as opposed to the rulings of a trial court?

Is that injury remedied by Petition for Panel Rehearing given the great inertia of persuading a body to admit to its own error?

Put another way, are a Plaintiff's Due Process rights infringed when a Court of Appeals effectively supplants the District Courts functions leaving plaintiff with no appellate body to which he can petition *(as a matter of right)* for relief from such "surrogate" trial court rulings?

Does the statistically slight potential (98% of *private party's* petitions were dismissed or denied in 1983) that the Supreme Court will grant Certiorari remedy that defect? Only 0.7% of those granted were *in forma pauperis (Harvard Law Review)*, a figure "deceptively large" (*Stern*, p426) because a major decision favoring many *criminal* defendants will result in summary dismissal or remand based upon that single precedent. Three quarters, or more, of the *in forma pauperis* applications are prepared by assigned counsel (Stern, at 425), an advantage no *civil* litigant enjoy's (nor does appellant!).

Unless the Supreme Court grants certiorari to *exercise it powers of supervision* over the courts below this *civil*, non-in forma pauperis *pro se* litigant will have been perpetually stripped of his Due Process rights!

case. He would have had such an opportunity if a proper motion had been made by his opponent in the trial court.

The D.C. Circuit *again* acknowledged *Fountain* in *Ramirez de Arellano v. Weinberger*, 745 F2d 1500 (1984)

> In *Fountain* the Supreme Court previously admonished this court when it attempted to raise and resolve an entirely new issue by summary judgment on appeal***the issue was extant on the record and pleading's *(but)* the Supreme Court reversed, since there was no opportunity for the opposing party *to contest the applicability* of the facts to the legal issues relied upon.

Even the 5th Circuit in *FDIC v. LaGuarta*, 939 F2d 1231 (1991) held to that effect, illustrating again the "panel-to-panel" variances within the Court of Appeals, or an indifferent treatment of *pro se* cases.. While it was true, they said, that they may affirm a summary judgment on a ground not relied upon by the district court:

> This court has *clearly* held***that it will generally not consider a new ground on appeal raised by an appellant in opposition to summary judgment *(citing cases)*. The same should apply to new grounds raised by an appellee***where the parties were not afforded an opportunity to develop the issue below, and it was not***included in the *issues****

tendered below, so the the party was not on notice of the need to meet it, and the record appears not to be adequately developed in that respect (FN 20 cites 4th, 7th, 2nd, and D.C. Circuits holding likewise, and the 9th to the contrary).

Accord is found also in *Drexel v. Union Prescription Centers,* 582 F2d 781, 784 (3rd Cir. 1978).

In *Celotex,* at 323, the Majority for the Supreme Court said "a party seeking summary judgment *alway's* bears the *initial* ("first tier") responsibility of informing the district court of the basis for its motion, and *identifying those portions of****(the record) which it believes demonstrate the absence of a genuine issue***".

It would be an impossible burden for the nonmoving party to justify every statement in "The Letter" (*which was seven pages in length*), along with *other* evidence in the Record, without the moving party *specifying* those portions upon which he would rely. Even the 5th Circuit has said such a burden "would encourage trial byambush", by moving party's.

Summary Judgment is proper (only) if the movant demonstrates *initially* ("first tier") that there is an absence of genuine issues of material facts (*Celotex, at 323)* The movant accomplishes this by informing the *(trial)* court of the basis for its motion, and *by identifying portions of the record* which highlight the absence of genuine factual issues. *See generally id.*

Smith v. Olin Chemical Corp., 555 F2d 1283, 1285 (5thCir.1977).

The courts reliance upon such new issues raise's, in a very real sense, the same *procedural and fairness concern's* created by *sua sponte* action. *Neitzke v. Williams*, 490 US 319 (1989).

Even if he tried to anticipate such grounds, Plaintiff could not be assured that the Court would not affirm on an "independent basis" so *non-sensical* that Plaintiff could not have anticipated "the need to meet it" (*FDIC* supra).

Plaintiff was compelled to use 18 of the 20 pages permitted him by the Local Rules to rebut a broad range of defense's (res judicata, collateral estoppel, laches, in addition to limitations, claims for Rule 11 sanctions, attorney fees, and Motion for Permanent Injunction) "*specified*" by the Defendant at the trial court level.

The availability to Plaintiff of motion to reconsider, or new trial, should "not suffice to save the day" for the moving party. *Batterton v. Texas General Land Office*, 783 F2d 1220, 1225 *(analogously)*.

When a party moves for summary judgment on ground A, his opponent is not required to respond to ground B, a ground that the movant might have presented but did not. *Edwards v. Honeywell*, 960 F2d 673, 674 (7th Cir. 1992).

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3. Is there a sufficiently clear inference that the Court of Appeals improperly perceived ERISA Sec. 510 *multiple* prohibition's as a single indivisible offense, and <u>not</u> subject to distinct and disparate proofs, for Discovery Rule purposes?

Alternatively, did the Court of appeals improperly *infer*, from Plaintiff's early conjecture that his discharge was in retaliation "for insisting on my rights" *(in essence a Sec. 510, Part #1 offense)* that he either knew, or should have known, that his discharge was *simultaneously* "for the purpose of interfering with the attainment of rights" (a Part #2 violation)?

The salient prohibitions of (29 USC §1140) ERISA 510 (alphabetized and numbered here in an attempt at clarity) are:

It shall be unlawful***to (A) discharge***,

This question involves "an important question of statutory construction" *(Shapiro v. United States*, 335 U.S. 1, 4 (1948)) that calls for certiorari.

The Supreme Court in *Anderson v. Liberty Lobby*, 477 US 242, held that "credibility determinations, the weighing of evidence, and *the drawing of legitimate inference from the facts*" are unsuitable for summary judgment.

The courts general warning still should be kept in mind inferences are generally for the trier of fact, which continues to have the power to draw such inferences---factual or legal---if a reasonable person should disagree. *Childress*, at §5.02.

or (B) discriminate against a***beneficiary,

(1) for exercising any right to which he *is* entitled***,

or (2) for the purpose of interfering with***any right to which such participant *may become* entitled***.

"The Letter" (Question #2) upon which the Court of Appeals relied solely is addressed, *narrowly and exclusively*, to Sec. 510's *Part #1*.

McGann v. H&H Music Co., 946 F2d 401, 408 (5th Cir. 1991) coincidentally one of the most controversial ERISA decisions in the legislations history, has recognized that distinction. Appellant has been unable to find other cases which treat that issue in a direct fashion. The 5th Circuit noted (at 404) that McGann contends (using an analysis identical to Appellants):

"***that defendants violated *both* clauses of Sec. 510 by discriminating against him *for two purposes* (1) "for exercising any right to which *(the beneficiary)* is entitled,", and *(the statute uses the term "or" to indicate they are alternative remedies)* (2) "for the purpose of interfering with the attainment of any right to which such participant may

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The dichotomy between Parts #1 and #2 was first raised by Plaintiff's Response to Defendants Motion for Summary Judgment (Appendix p104), again by Appellant's Brief (Appendix p107), and finally by his Motion for Panel Re-hearing where he again argued the germane portions of Sec. 510 (Apdx. p109).

become entitled".

The 5th Circuit, using the Appellants exact terminology, rejected McGann's claims that there:

> "***could be "*retaliation*" for McGann's filing of the claims" (*McGann*, at 405).

In an indirect fashion, the 5th Circuit also ruled no "*interference*" had occurred *(echo's here of Clark, infra)*, because McGann:

> "***does not claim he was not fully reimbursed for all claimed medical expenses incurred***or that the full $5000 has not been made available***" (FN 5).

Early conjecture that one may have a claim (or multiple claims), before having an opportunity to investigate to determine whether it is in fact actionable, does not constitute "discovery".

Part #1 is expressed in the past or present tense ***("is entitled")***, and Part #2 in the future context (***"may become entitled"***). In particular cases, this distinction may be *critical* (Justice Scalia, ***Firestone v. Bruch***, infra, at 98).

Because of the considerable time interval during which Plaintiff attempted to rehabilitate himself, Plaintiff was certainly to "***become*** eligible" when he made his formal claim for disability benefits in the future. The "essential act" of *Paris, infra,* that is, his retinal hemorrhage, had already fixed the Plan's contractual obligations, however.

The Plan makes specific allowances for rehabilitative employment outside the Commercial Credit organization without forfeiture (i.e. by ***saving***) of benefits

After initially pondering any *potential* litigation, investigation might well determine that some *or even all*, of a Plaintiff's conjectural remedies were not actionable at all, given the facts and law at *that* interval.

See *Parker/Willis* for the *degree* of diligence required. That was satisfied by Beneficiary's letters of inquiry *subsequent to* "The Letter".

In "The Letter" Plaintiff touched upon *many* potential wrongful discharge offenses, both statutory and common law, that required examination. Those statutory remedies *potentially* available (the *"myriad*

(Plan Art. V-Rehabilitation Benefits):

> 5.1 When Rehabilitation Benefits are Payable. A participant who***accepts work***(*other than****with his****Employer*) will be eligible to receive a rehabilitation benefit.
>
> 5.4 Duration of Benefits If the Participant subsequently obtains further employment*** *with an employer other than Commercial Credit*, and***becomes disabled under the other employers disability plan***such benefit payments will be deducted from any rehabilitative benefit payable***.

Indeed, even if the Plan terminates it "****will not affect the right to benefits of any Participant who became disabled before the date of termination" (*Termination of the Plan*-Art. 7.2). Defendant would have it that employment termination *equates* with benefit termination.

Art. 7.2 is contrary to the express basis for Defendants attempted denial of benefits *("All coverage***ends at midnight on the last day of active employment"*.

of other reasons for which his employer might have discharged him". *Clark v. Resistoflex, infra,* 854 F2d 761,at 771 (5th Cir. 1988)) included Workers Compensation, ERISA retaliation, ERISA interference, ADEA, and state disability/handicap statutes.

Decisions in several Circuits (as in the 5th Circuits *Clark*) mean certain summary dismissal of premature Part #2 *(interference)* actions until Defendant declares benefits denied *("forfeited" to use Clarks terms)* for discharge based reasons.

Appellant has argued that Respondent cannot avoid the impact of the Discovery Rule in this summary judgment proceeding, unless he show that Appellant, by *due* diligence investigation, would have been discovered a claim *then* fully "actionable" in the face of *Clark.*

ERISA litigants in the 2nd and 3rd Circuit *might* fare moderately better than in the 5th Circuit. In *Gavilik v. Continental*

Even if there existed an actionable Part #1 claim, which Plaintiff chose *(as was his option)* not to exercise for *any* reason, the *Restatement of Judgments* 2d 26, Comment j, admonishes (analogously, for it spoke of claim splitting):

> A defendant cannot justly object to being sued on part of a claim, or phase of a claim, that the plaintiff failed to include in an earlier action because of the defendants fraud. Such concealment may be of particular concern if there is a fiduciary relationship between the parties.

Can, at 852, it was held that such a Sec. 510 offense should even yet be actionable:

> "****regardless of whether the interference is successful and regardless of whether the participant would actually have received the benefits absent the interference" (citing *Zipf v. American Telephone & Telegraph Company.*, 799 F. 2d 889, 893 (2nd Cir.,1986).

Appellant met then his "second tier" burden under FRCP 56 by presenting proof to the court that a predenial action would have been summarily dismissed under Clark (that is, it would have *then* been non-actionable).

He has also proffered Defendants multiple admissions that Plaintiff could not have known, given the employers predenial conduct, that his discharge had been for the purpose of "interfering". But he did not rest upon that alone. He presented, as well, the documentation (letters, etc.) upon which those admissions were based.

If seriously challenged by early litigation an employer need only abandon his ***original, ultimate*** "purpose", and extend benefits to avoid both the civil and ***criminal penalties*** of ERISA. That does not undo the injury! It only erases the proof, necessary in the 5th Circuit, for successful maintenance of a Sec. 510 action.

At that point then the "*third tier*" burden shifted to the Defendant to even yet articulate and demonstrate the absence of issues of material fact. Pointing to discovery (or discovery that might have resulted from due diligence investigation) of a *"non-actionable"* claim will not suffice. *By analogy, a genuine* factual dispute about the existence of a *non*-material factual issue (*Anderson*, at 211[4]), will not preclude summary judgment.

A mere "conclusory assertion" (Justice White, concurring, *Celotex*, at 328) by Defendant (when faced at that point with Plaintiff's proof to the contrary), that the proposed claim was not only "*actionable*", but either discovered or discoverable, does not satisfy the *initial* "first tier", nor the ultimate "third tier" burden of proof (as pointed out earlier the Local Rules does not permit a "third tier" reply *as a matter if right*).

This case presents an important question of federal law, which *has not been, but should be*, settled by this court (Rule 10(.1.)(c)). It goes to the very heart of the ERISA Sec. 510/511 Civil Enforcement scheme.

Of course, other factors deter one situated as Appellant, aside from the mere futility of a premature action before *Clark's* "forfeiture". Punitive sanctions, including the opposing parties attorney fees and costs, may be imposed where improvident ***premature*** litigation does not meet FRCP Rule 11's stringent

requirement's. Commercial Credit has sought such sanctions with a vengeance throughout this litigation.

One must attest that "after reasonable inquiry it is well grounded in fact and is warranted by law, or good faith argument for***reversal of existing law****. Litigation is costly, in monetary and human terms, and is not entered into lightly by near indigent, *pro se* plaintiff's. Further, (*Paris*, 361) it may be a waste of scarce judicial resources.

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4. Should a defendant occupying that tripartite role as "discharging" Employer, Named Fiduciary and Plan Administrator *(and whose Chief Investment Officer is Plan Trustee)*, be held subject to the "principles of trust law" under Sec. 510/511, using the analysis of the Supreme Court in *Firestone v. Bruch*? Were they thus compelled, by the Loyalty Rule, within the statutory limitations period, to *declare with unmistakable clarity* their intent to *"interfere" (solely for discharge-based reasons, and only after the discharge itself is barred by limitations)* with beneficiaries ERISA rights? Does such a duty of disclosure exist when *only a derivative* fiduciary relationship exists?

In *Firestone Tire & Rubber Co. v. Bruch*, 489 US 101, at 111; 103 L Ed. 2nd 80, at 92 (1989) the Supreme Court, noting that ERISA "abounds" with the language and terminology of trust law, held:

> In determining the appropriate standard of review of actions under Sec. 1132(a) (2)(B) we are guided by principle's of trust law (citing Central States, Southeast and South west Areas Pension Fund v. Central Transport, Inc. 472 US 559, 570, 86 L. Ed. 2D 447, (1985)).

The Court *(at P91),* however, restricted their holding to "actions challenging denials of benefits based on plan interpretations. We express no view as to the appropriate standard of review for actions under *other* remedial provisions *(e.g. Sec. 510/511)* of ERISA".

A "discharge for the purpose of interfering with the attainment of benefits" under Sec. 510, and the "purpose" to "restrain***by fraud" under Sec. 511, are certainly *interrelated* with, and even *inextricably tied to,* Sec. 510(a)(1)(B) where the intent is to defeat benefits under that part.

The Supreme Courts decision did not, however, reach the pivotal issue in the instant case. That is, whether this Defendant is subject to *"principles of trust law"* under Sec. 510/511.

In *Concrete Pipe v Pension Trust,* 124 L. Ed. 539 (1993) we find this discussion:

All references to "fiduciary", or "trust", are meant to include any derivative of those roles, no matter how the Defendant came to be so burdened (*Bierschwale, Monnig, etc.*).

> As we said in another case discussing employee benefit pension plans permitted under LMRA***under principles: of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties, to deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against trustees dividing their loyalties must be enforced with uncompromising rigidity. A risk of bias may also inhere in the mere fact that, fiduciary obligations aside, the trustees are appointed by ***the employers (p560).

In his Response to Defendants Motion for Summary Judgment (Appendix, p104) Plaintiff informed the District Court:

> Defendants adduce no proof or case law controverting plaintiff's pleading's, that *as a fiduciary*, Defendant fraudulently concealed material facts and thus his cause of action.

Clearly Defendant failed to meet the burden imposed upon them (*Celotex*, 324, *Zales, Burns*, 287 "conclusively negate"), to disprove both their *status and duties* as a fiduciary, for limitations purposes, at the District Court level. Exceptions to the discovery rule are thus waived (as Plaintiff urged both in the trial court, and on appeal), and Summary Judgment should have been denied as a matter of law:

> All transactions between fiduciary and principal are pre-

sumptively fraudulent and void***burden lies on fiduciary to establish validity of any particular transaction in which he is involved. *Chien v. Chen*, 759 SW2d 484, 487 (CA 1988). The fiduciary (or a *"Bierschwale"*, infra, derivative) is compelled then to offer some legitimate reason, that overwhelmingly justified the fiduciary's withholding of it's intent to deny benefits until limitations barred Appellants claim. Of course, it did not, and could not!

In *Matsushita* v Zenith, 475 U.S. 575, 588 (1986) the court affirmed that the plaintiffs was correctly required to "show that the inference of *conspiracy* (*was*) reasonable in light of *competing inferences*". What unannounced "*competing inferences*" (or oversight of Commercial Credits "competing interests") so swayed the Court of Appeals that they were able to excuse the fiduciary's high

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Donovan v. Bierwirth, 680 F2d 263, 272/2nd Cir. (1982) footnotes, citing the *Restatement of Trusts*, reflect that the "fiduciary obligations of the trustee to the participants of the Plan are those of trustees of an express trust ***the highest know to the law".

In *Mass. Mut. Life Ins. Co. v. Russell*, 87 L. Ed 2nd at 110, in a separate, concurring opinion *(Brennen, Blackmun, White, Marshall)* it was expressed that:

> ****it is black letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits *(see FN 7 citing Restatement of Trusts* 2d 182 (1959; Bogert, *Law of Trusts*, #109 (1973).

Loyalty Rule duty "to reveal all material facts"?

The state "rule of decision" affecting limitations, if the Employer is a fiduciary (is a derivative of that role, or has waived that issue), and subject to trust law, is expressed by the Texas Supreme Court in *Willis v. Maverick*, 870 SW2d 642, 645:

> A fiduciary is obligated to render a full and fair disclosure of facts material***facts which might ordinarily require investigation likely may not excite suspicion where a fiduciary relationship is involved***.
>
> Postponement of the cause of action***prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure.

Willis was cited with approval in *FDIC v. Howse*, 736 F. Supl. 1437, 1441 (5th Cir)

> The discovery rule also applies to an action for breach of fiduciary duty sounding in tort.

See also *Chein v. Chen*, 759 SW2d 484 (Tex. App/1968) *(good faith and candor)*. Fiduciary relationship is based upon fair dealing and good faith rather than any legal obligation, and includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations.

May arise informally from moral, social, domestic, or purely personal relationships. *Texas Bank v. Moore*, 595 SW2d 502, 507 (Tex. S. Ct. 1980).

It matters little how defendant became burdened with the high duty for disclosure of material facts (i.e. fraudulent concealment of an intent to deny benefits post-limtiations) for purposes of imposing the "most analogous" state limitations rules. *Meadows v. Bierschwale*, 516 SW 125, 128 (Tex. S. Ct. 1974), has said that a *constructive* trust (as opposed to an *express trust)* may arise under certain circumstances:

> It is not essential***that a fiduciary relationship exists ***actual fraud***confidential relationship, justifies the imposition***.

Whether such exists is a "matter of fact" precluding summary judgment (*Chein*, FN 6, citing *Consolidated Gas*, and other cases).

The Fifth Circuit has recognized *Bierschwale* in *Matter of Monnig's Department Stores, Inc*, 929 F2d 108. 201 (1991):

> This court discussed the relationship necessary *(absent actual fraud)* for imposition of a constructive trust under Texas law ***(1) confidential or *fiduciary relationship* <u>*prior to and apart from*</u> the transaction in question***may (also) be established through***other types of close, confidence-inducing relationships. It need not arise from a *strict, formal* fiduciary relationship.

Factually Plaintiff has demonstrated *(Brief P30)* that:

> The Plan is a trust *(Art. 2.17, and 8.5)*, and Commercial Credits Chief Investment Officer is the designated Trustee (Summary Plan Description, P4). The other Plan functionaries, Plan Administrator and Named Fiduciary are designated as the Employer, Commercial Credit *(Plan Art. 2.8, 2.14, and 8.1)(Summary Plan Description P4).*

During Plaintiff's long 19 year tenure, as a Participant, he relied upon the duty's inherent in those relationships, including Plan investment decisions on Plaintiff's behalf (i.e. *Bierschwale's* "fiduciary relationship prior to and apart from the transaction in question"). The 5th Circuits criteria for *imposition of a constructive trust (Monnig, supra)* is then fully met.

Defendant proved to be a "wolf in sheeps *(fiduciaries)* clothing", however, when faced with paying benefits from that self-same Plan.

As a matter of law, the District Court and 5th Circuit Court of Appeals was obliged to treat both Defendants status and inherent duty, as asserted in the Complaint, as *true and undisputed.* Those issues were waived for the purposes of the Motion. Defendant could

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Constructive trust created in an ERISA context. Reid v. Gruntal & Co., 760 F Supl 945/D. Me (1991).

not raise exceptions to either their status, or duty, on appeal.

Yet Defendants *did* seek to cure that defect by their Response to Plaintiff's Appellant Brief:

> Greens allegations with respect to a breach of fiduciary duty are again an attempt***to avoid the applicable statute of limitations by recharacterizing his claims***without obtaining leave of Court for the amendment of his pleading's.

To which Plaintiff Replied:

> Plaintiff has not "recharacterized" at all! His Original *(unammended!)* Complaint (Appendix, p102) clearly asserts fraudulent concealment by a fiduciary.

Neither did the Court of Appeals address Defendants status or duty as a fiduciary, even though Defendants burden in that role was onerous. It would not countenance, as a violation of the Loyalty Rule, their failure to declare "The Transaction", in clear and unequivocal terms, before limitations barred the Beneficiary.

Clearly Commercial Credit breached the Loyalty Rule mandating they act with "good faith and fair dealing" and to "reveal (such) material facts".

ERISA's *(Claim Procedure)* 29 USCS §1133 speaks to the interplay of "Named Fiduciary" and Commercial Credits status as such in "claim denials":

"***an appropriate named fiduciary (Defendant is not only the Discharging Employer, but the only Named Fiduciary) must provide a full and fair review of claim denials".

As important is Art. VII *(Named Fiduciary)* of the Plan. There Commercial Credit installs themselves in that role, with:

"****complete* authority *(to)****interpret the Plan and *** determine all questions arising in the ***interpretation and application of the Plan (a role more encompassing than that required by Sec. 409).

The Loyalty Rule is framed for *all* fiduciaries and not merely for trustees *(Bogart,* at 218). The duty to make full disclosure and otherwise to exhibit extreme good faith runs throughout the whole law of fiduciary and confidential relations *(Bogart,* at 407).

Restatement of Trusts 2nd §169 defines the essence of the Loyalty Rule. It holds that a trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary, to deal fairly with him:

****and to communicate to him all material facts in connection with the transaction *("The Transaction")* which the trustee knows or should know.

Mere failure to disclose facts is not necessarily fraudulent concealment, except in those transactions that are in their very nature intrinsically fiduciary and involve condition of absolute good faith *(Texas Harvester Co., v. Wilson-Whaley Co.,* 210 SW 574).

The expression "fiduciary relationship" is***a defining element of the legal concept of a "trust", *(but)* the same expression has been employed by analogy in *other* relationships that *are* not "trusts" in the strict legal or technical sense.

This simply is a short hand way of implying that the higher duties demanded of a fiduciary are applicable in that particular relationship—a relationship where "the law demands of one party an unusually high standard of ethical or moral conduct with reference to another" *(1 Bogert, Trusts and Trustees,* at 3, 2d Ed. (1984); Restatement 2d Trusts 2 (1959), as cited in *Chein,* supra, FN 6).

"Legal duty", the breach of which may constitute fraud, may arise because of statute, from contract, or from trust. *Chein v. Chen,* 759 SW2d 484 (Tex. App. 1988).

Constructive fraud encompasses those breaches that the law condemns as *fraudulent merely because they tend to deceive others*, violate confidences, or cause injury to public interests, the *actors mental state being immaterial*. *Chien,* HN 11. *Archer v. Griffith,* 390 SW2d 735 (Tex. S. Ct. 1965).

In many cases the self-dealing of the trustee may be kept secret until it is too late for the beneficiaries to object and obtain relief *(Bogart on Trusts, 2nd, P543).* In this instance Commercial Credit, did indeed, keep their intent to deny benefits for discharge-based reason ("The Transaction") secret until it was too late!

Fraud may be either *actual or constructive.* *Actual* fraud encompasses intentional breaches of duty that are designed to injure, or to obtain an undue and unconscientious advantage. *Chein*, HN 11.

A false representation of a past or present material fact, *when has a duty to speak the truth*, is of course a frequent ground for recovery in fraud when another relies thereon to his detriment, *even in an ordinary arms-length transaction* in which no "fiduciary duties" exists and only the ethics of the marketplace apply. *Jeffcoat v. Phillips*, 534 SW2d 168 (CA Tex. 1976).

Summary judgment of such a fact issue is precluded *whether or not* Commercial Credit was a fiduciary (*Chein*, at 496).

One of the most fundamental duties of the trustee is that he must display throughout***complete loyalty to the interest of the beneficiary ***exclude all selfish interests ****(and)* of third persons *(Bogart*, at 198). It is generally, of not always, humanly impossible for the same person to act fairly in two capacities and on behalf of two interests in the same *transaction (Bogart*, at 205). But, Com-

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ERISA provides that not only the persons named as fiduciaries by a benefit plan, but also "anyone who exercises discretionary control or authority 6over the plan's management, administration, or assets (see 29 USC §1002 (21)(A)(i)), is an ERISA "fiduciary". *Mertens v. Hewitt Associates*, 1234 L. Ed 2d 161, 167 (1993). ("****or disposition of its assets", *Firestone*, at P94).

mercial Credit did act in multiple capacity's without declaring to Plaintiff his need for awareness that the duty of "good faith and fair dealing" was not to be relied upon in this specific transaction, which is of particular concern when their role as Employer, Plan Sponsor, Named Fiduciary, and Plan Administrator were so interrelated, and inevitably indistinguishable.

As Employer they had, during his 19 year tenure, deducted premium charges for ERISA benefits from the Plaintiff's salary They distributed materials concerning changes in the Plan's, and conducted benefit indoctrination meetings through the Commercial Credit Human Resources Department. They took the initial reports of claims made against the Plan's.

Those are representative of the element's *(Bierschwale* and *Monnig,* supra) utilized in creating a constructive trust, and which impose upon Commercial Credit fiduciary duties obligating full disclosure.

The Supreme Court in *Moser v. Darrow* 341 US 267 would have the courts "make disobedience of the *(Loyalty)* Rule*** so prejudicial *** that *(the fiduciary)* and all others will avoid disloyal transactions in the future" (see also *Bogart on Trusts*, p543).

Better it be, in the balancing of public policy objectives, *Moser, Concrete Pipe*, and other trust law suggests, that a fiduciary

unable to demonstrate "full disclosure of material facts" be cast in judgment, than penalize his Beneficiary whose asserted "discovery" of those *facts* rests on the most unsound of all possible proof.

Tolling the limitations period would achieve that end.

We believe that any burden placed upon a***(*fiduciary*) by***the discovery rule is less onerous than the injustice of denying relief to unknowing victims. *Willis*, at 646. Duty to disclose is tantamount to concealment for limitations purposes. *Willis*, HN 5.

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5. Should the District Court and the Court of Appeals have placed the burden upon Defendant, as mandated by the Texas Supreme Court's *Burn's v. Thomas*, that "a Defendant seeking summary judgment must *prove* when the cause of action accrued and must *conclusively negate* the discovery rule", by compelling they *prove*, rather than merely assert, the discovery of a *then fully actionable* (vis a vis *non-actionable*) claim ?

This Question will be treated in three parts.

(a) THE TWO YEAR STATUTE OF LIMITATIONS FOR "DISCHARGE WITH PURPOSE", AND THE DISCOVERY RULE UNDER TEXAS' "RULE'S OF DECISION".—As noted earlier Defendant did not raise exceptions to the discovery rule, nor fraudulent concealment (*whether or not* in a fiduciary capacity)

charge, until before the Court of Appeals. Thus any exceptions were waived, and there being no disputed fact issue respecting the discovery rule, Defendants limitations defense should have been treated as fatally impaired.

The Supreme Court in *Celotex Corp. v. Catrett*, 477 US 317, 324 (1986) instructs:

> It is not enough to move (*obviously 1st tier*) for summary judgment without supporting the motion in any way or with a conclusory *assertion* that the plaintiff has no evidence to prove his case***".

Justice White, in a concurring opinion (at 328) stated "it is the defendant's task to negate, *if he can* the claimed basis for the suit".

That is in concert with the Texas Supreme Court in *Burn's v. Thomas*, 899 SW 2d 266, 287 N20 (1990) where it was held:

> A defendant seeking summary judgment on the basis of limitations must prove when the cause of action accrued and *must negate* the discovery rule by proving as a matter of law

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This courts adoption of the Sec. 413's six year limitations period would significantly reduce the risks for ERISA beneficiaries, and "harms" only the miscreant employer. It "provides a closer analogy than available state statutes***federal policies are at stake***(*and it is*) a significantly more appropriate vehicle for interstitial lawmaking***". *Del Costello v. Teamsters*, 462 U.S. at 171-172.

that there is no genuine issue of fact when the plaintiff discovered, or should have discovered, the nature of the injury.

Vance v. Bell. 797 SW2d 403, 405 (Tex. CA 1990) ("*conclusively* negate")(would not relieve the moving party even though the discovery rule was not at issue until appeal).

Ardila v. Saavedra, 808 SW2d 645, 647 (Tex. App. 1991), citing *Zale v Rosenbaum*, 520 SW 2d 899 (Tex. S. Ct. 1975) held that when the nonmovant raises a suspension statute in response, the movant must also *conclusively negate* the application of these issues, but:

The application of the summary judgment rules reverses the burdens that would apply at trial, where the party relying on the tolling or suspension of limitations would have the burden.

One analyzing the majority's discussion (*Celotex, at 331*) of the manner in which the case might progress "if the burden of persuasion at trial would be on the nonmoving party", must recognize the "*Burn's difference*".

The Court of Appeals offered no reason for their failure to place the burden upon Defendant to affirmatively "*negate* the discovery rule".

The Supreme Courts *Board of Regents, etc. v. Tomanio*, 446 US 478, 485-86 (1980) controls:

Any period of limitation***is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action***virtually all statutes of limitations***interrelated with provisions regarding tolling, revival, and questions of application***state laws

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For ordinary civil cases, the *Anderson* holding *will have its greatest meaning* in emphasizing that a court, when applying summary judgment law, must consider *who has the burden of proof at trial*. *Childress, at* §5.04.

Celotex, has then created a tension and an *ambiguity*, that calls for the guidance of the Supreme Court to resolve.

We have the Texas Supreme Court in *Burn's* on the one hand, applying Texas law on tolling/limitations issues under ERISA (as they have been authorized by the Supreme Court in *Board of Regents*, and a score of other cases). Yet now *Celotex*, seems to demand a broad, all encompassing, determination based upon *"who has the burden of proof at trial"* which upsets the equilibrium that has previously (*and very satisfactorilly*) existed.

The decision of the court of appeals is one as to which state laws and decisions are applicable, a *conflict with, or a refusal to follow*, a decision rendered by the highest court of the state is ground for review of the court of appeals decisions. Stern, Gressman, & Shapiro, Supreme Court Practice, 6th Ed. §4.10, citing *Erie, Six Companies v. Highway District*, 3411 U.S. 180 (1940), and other U.S. Supreme Court cases.

Whether state or federal law control's on a particular issue or procedure. Hanna *v. Plumer*, 380 U.S. 460.

which affect tolling regarded as 'an *integral part* of the***statute.

Plaintiff need not rely exclusively upon Sec. 511. State statutes of limitations, and case law tolling limitations in fraud cases *(Williams v. Khalaf, and Willis v. Maverick, supra)* provide the "rule of decision" under ERISA and have the same effect:

> As a general rule when Congress omits a statute of limitations for a federal cause of action, courts "borrow" the local time limitation most analogous to the case. *(Lampf, Pleva, etc.*, 115 L.Ed 2d 321 (1991). In the absence of an applicable ERISA limitation the courts thus apply the statute of limitation for the state claim *most analogous* to the ERISA claim pursued *(Vernau v. Vic's Market, Inc.*, 896 F2d 43, 45(3rd Cir (1990, see also *McClure v. Zoecon*, 936 F2d 777 (5th Cir. 1991).

(b) FRAUDULENT CONCEALMENT IS SUBJECT TO A FOUR YEAR STATUTE OF LIMITATIONS—Did the court then improperly apply a two years statute of limitations to both the Sec. 510 (discharge with purpose to interfere) and Sec. 511 ("restraint by fraud" by concealment of the cause of action) allegations?

As an analogy, consider a legal malpractice action, in which the client cannot exercise his action against the tortfeasor *(subject to a two year statute of limitations)*

The Texas Supreme Court has held in *Williams v. Khalaf,* 1990 Texas LEXIS 42; 33 Tex. Sup. Ct. J. 354, 355-56, March 28, 1990, in a case of first impression, held that a four (4) year statute apply's to fraud.

As with the demonstrated dichotomy between Parts's 1&2 of Sec. 510, Sec. 510 and Sec. 511 speak to seperate and distinct offenses. Even if an employees rights are defeated under Sec. 510 because they are barred by a two year statute of limitations, a separate action under Sec. 511 asserting he was "restrained" by the Defendants fraud from exercising those rights timely will permit a recovery of his damages.

(c) *DISCRIMINATION* "WITH PURPOSE" IS A SEPARATE AND DISTINCT OFFENSE FROM *DISCHARGE* "WITH PURPOSE" TO INTERFERE--The Court of Appeals should have then given effect to that distinction under Sec. 510 (Appendix, p104/107). By their uncontested ruling July 15, 1990 was the first manifest act of discrimination (i.e. denial

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because of his lawyers negligence and his fraud in concealing the cause of action against himself. Once the concealment is discovered the client is permitted now to try a "lawsuit within a lawsuit". First, he makes out a case against his lawyer for malpractice, and fraudulent concealment. Then, he is compelled to show that he would have recovered certain sums from the tortfeasor except for his lawyer's wrongful conduct. Those sums are the measure of damages which his lawyer must then pay.

Such a claim would be subject to the four (4) year limitations period of *Williams v. Khalaf (supra).* even though the limitations period on *both* underlying tort action's had run. That decision was *subsequent to* the 5th Circuits "narrow and novel" adoption, solely to Sec. 510 *tort* cases *(McClure),* of a 2 year limitations period.

Williams four year limitations period should apply to Sec. 511's " fraud".

of benefits to *former* employees, on the express basis that beneficiary was a former employee, while reserving benefits to *present* employees).

Here the filing of the complaint both took place within the two year limitations time span following that "first manifest act". Both *former* and *present* employee's are "participants" under 29 USC 1002(7), and entitled to equal treatment under ERISA. See Appendix, p99.

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6. Did the Courts of Appeals uncontested finding of an initial July 15, 1990 denial of contractually due benefits *(a "discovery" only thereupon actionable under Sec. 502(a) (1)(B))*, for discharge-based reasons, and their imposition of the discovery rule thereto, compel simultaneous application of that identical manifestation date to the Sec. 510, discharged-based, "*purpose* to interfere" charge, a *"purpose"* that only manifested itself *with* that denial, and which only then became actionable under the 5th Circuits *Clark* decision?

Plaintiff has found no cases directly in point. Support is found, however, in an indirect, but reasonable, fashion. As a threshold matter Plaintiff simply could not have known he had an actionable claim for "discharge with purpose to interfere" (Sec.

510/511) until that interference manifested itself July 15, 1990. Congress did not expect clairvoyance of ERISA beneficiary's.

Additionally, recent 5th Circuit case law *(Clark, supra, at 771)* has effectively imposed, as a *threshold* requirement for the maintenance of an *interference* action, that a plaintiff demonstrate actual loss of benefits as a result of the discharge. They have thus created for *interference* plaintiff's an insurmountable summary bar to premature action's at *any* point in time when:

> ***it is undisputed that no benefits previously earned*** will be forfeited by reason of his discharge***the impact upon retirement benefits was only incidental***the resulting loss was simply that which would result from any discharge*** *myriad* of other possible reasons for which an employer might have discharged him.

Clark at that juncture was not faced with a manifest, discharge-based, benefit denial *(nor would have been Appellant!)*. A party cannot raise a:

See also *Corum v. Farm Credit Services*, 628 F. Supp. 707, 718 (D. Minn. 1986) (plaintiff must show more than "lost opportunity to accrue additional benefits"); *Baker v. Kaiser Aluminum & Chem. Corp.*, 608 F. Supp. 1315, 1319 (N.D. Calif. 1984); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2nd Cir. 1988).

"raise a fact issue simply by "asserting a cause of action to which *state of mind* is a material element (*Clark*, at 771). *Turner v. Schering Plough*, 901 F2d 335, 348 (3rd Cir. 1990) citing *Clark* (without pension "forfeiture", beneficiary cannot demonstrate necessary "*pension based aminus*").

The answer, as Plaintiff proposed in his Petition for Rehearing, is to compell the moving party to demonstrate (*Burn's*, 287, *"conclusively negate")* that the *non*-moving party could have survived summary judgment, and challenges to discovery, long enough to assure himself and the court that his preforfeiture lawsuit was, in fact, either action-able or *non*-actionable. In other words, that it would not be *dismissed as premature* under the *Clark* doctrine. Commercial Credit made no such attempt though they had the burden under *Celotex* (Question 1), *Zales* and *Burns* (see Question 5).

Paradoxically, in *Paris v. Profit Sharing Plan, Etc.*, 637 F2d 357, 361 (1981) the 5th Circuit discussed, *at great length*, the appropriate limitations period for a denial of benefits, for which an

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Celotex would tend to support the *Clark* "preforfeiture" rationale. In response to a "state of mind" query, the court (though they did not address that issue directly) said that a plaintiff must still offer "significant probative evidence".

Under Clark *actual loss of benefits*, based upon the discharge, is the significant (threshold) "probative" criteria.

earlier "essential act" (in this instance "discharge with purpose") *provided the basis for the (ultimate)* denial.

Respondant will no doubt argue that *Paris* applies only to benefits (Sec. 502 (a)(1)(B)) actions. But when the Sec. 510 action is only derivative of a denial *(i.e. an "interference")* of the benefits these identical principles should apply:

> We agree that a cause of action does not become a *presently enforceable demand until a claim is denied*. *To* hold other wise would put an almost impossible burden on employees covered by pension plans. It would require individuals who are unversed in the law to be constantly vigilant***moreover claims filed before a pension actually has been denied might be challenged for lack of ripeness. *United Public Workers v. Mitchell,* 330 US 75, 76-91 (1947).
>
> Requiring piecemeal challenges before an actual denial has occurred would also result in a great waste of judicial resources. We hold that for purposes of ERISA a cause of action does not accrue until an application is denied. *Kotsy v. Lewis,* 319 F2d 744, 750 (DC 1963), cert denied 375 US 964 (Statute of limitations does not begin to run until there has been "a clear and continuing repudiation"). See also *Gowan,* 586 F.2d, at 895 (plaintiff obviously has no cause for

complaint until he is refused benefits to which he has some colorable claim, since it cannot be known earlier how the ` instrument will be interpreted by the trustees).

Further said the court:

"***Title VII and ADEA cases recognize the reality that direct evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide it***specific intent will only rarely be demonstrated by 'smoking gun' proof *(Gavalik*, 912 F2d at 952), or by 'eye-witness's testimony as to the employer's mental processes' (*Aikens*, 460 US at 716, see also *Dillon v. Coles*, 746 F2d 998, 1003 (3rd Cir. 1984)). In most employment discrimination cases direct evidence of the employers motivation is *unavailable or difficult to acquire*. *(Loeb v Textron, Inc.* 600 F2d 1003, 1014 (1st Cir. 1979). Employees***have great informational disadvantages, they cannot reach into the minds of decision makers***. *Cuddy v Carmen,*694 F2d 853, 859 (D.C. Cir.1982).

Intentions simply are not the sort of things that can be observed*** does not mean they are necessarily hidden; it only means that the concept of "observation" has no application to them. Beyond Causation: The Interpretation of Action and the Mixed Motives

Problem in Employment Discrimination Law, *The Texas Law Review* (TLR), Vol. 70:17 (1991), P81, FN 286.

Intentions are going to be very hard to discern, much less prove. I might carefully conceal my intentions so that no one could ever tell what they are, because no one can actually observe my intentions. Intentions are accessible to me alone. The argument that intentions are difficult to proves hinges on the assumption that intentions are states of mind, that they are inner events or states (TLR, at 83).

Sec. 510/511 mandates that "no one" *(not just fiduciaries)* shall commit those prohibited acts. Nevertheless, one who should do so in a fiduciary *(or a derivative of that)* capacity, owes a much stricter duty of full disclosure of "facts material" ("The Transaction") on pain of postponement of the statute of limitations.

The 5th Circuit unflinchingly applied Clark in a subsequent ERISA case, *McGann v. H&H Music Co.*, 948 F2d 401, 408 (1991) saying "a party against whom summary judgment is ordered cannot raise a fact issue by stating a cause of action where defendants state of mind is a material element.

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7. Taking as proper the Court of Appeals inference, that "The Letter" supported an early recognition of a (*presumably actionable*) Sec. 510, Part #2 action, should the court have at that

point addressed *(and yielded since it is a question of fact, and state of mind issue)* to beneficiaries assertion that he *still yet* succumbed to Respondents (Sec. 511) representations (*made subsequent to the letter, and well supported by the record as fraudulent*) that the purpose of his discharge *was not* to defeat benefits, causing him not to pursue his Sec. 502 and 510 action timely?

Congress did not expect Beneficiaries, whose rights are to be infringed at some future date, to be clairvoyant, and particularly when he rely's upon his Fiduciary. On the contrary ERISA Sec. 503 imposes strict duties on the Plan Administrator:

> *(He)* shall "***provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan *has been* denied, setting forth the specific reasons for such denial written in a manner calculated to be understood by the participant***".

Am. Jur. 1221 *(Pensions and Retirement)* notes that the denial of benefits "that triggers the statute of limitations must be clear and final"!

The Court of Appeals found the only such denial to have first manifested July 15, 1990 *(which the Defendant has not contested)*, two and a half years postdischarge, and well beyond the two (2) year

limitations period. It was exclusively discharge-based!

That denial of benefits should properly have been given plaintiff at his termination interview, at which time his recently developed disabilities were discussed. But at latest, he should have been told, when "claim forms and (*benefit*) informational materials" were sent him early after his discharge (Appendix p105)(the bitter irony is that would make those "claim forms" *moot!*).

The term "adequate notice" under Sec. 503 should be given broad and flexible meaning, to circumstances such as this, by interstitial rule making. It is vastly more important that the court find that such notice must be given on a claim that "*is to be*" denied post-limitations, than on one which "*has been*" prelimitations. Otherwise, suppression of such crucial information will continue to provide unscrupulous employers a potent time-bar mechanism.

Plaintiff's proof (see both "The Admissions", and other proof) show's the Employer responded quickly (*thrice!*) to Plaintiff's letter's to allay any potential notion that the discharge would be utilized *(i.e. that it had as it's "purpose")* to "interfere with the attainment" of rights (Sec. 510, Part #2).

Contemporaneously with, and shortly following his initial letter, he wrote his Employer three other times. He sought to assure they would afford him ERISA benefits should his attempts at self-

rehabilitation fail. In their responses no mention was made of an intent to ultimately deny benefits for discharge-based reasons. The due diligence requirements of the discovery rule were met. Of such the Texas Supreme Court has said:

> Thus when inquiry is made to the highest source, and inquirer is met with reassurance of the truth of the representations the injured party is not to be charged with a failure to exercise diligence to ascertain the falsity of the assurances. Such assurance constitutes an affirmative concealment of the fraud, and prevents the running of the statute of limitations. *Parker Secur. Co v.Owen*, 1SW2d 271 (1928).

Defendant thereafter (*i.e. subsequent to* "The Letter") withheld (1) a "premium" charge from his postdischarge salary for Long Term Disability benefits, (2) he was furnished by the employers admission "claim forms and informational materials", and (3) he was paid medical benefits, under an ERISA Plan, for treatment of his retinal hemorrhage (see "The Admissions" at "Reasons--I").

On that last point *Massie v. Indiana Gas Co.*, 751 F. Supp. 261 (SD Ind. 1990) says:

> "Also persuasive is plaintiff's argument that the defendant cannot avoid the mandates of ERISA simply by waiting a ***period of time after the use of a benefit to effect a de-

cision***based on considerations prohibited by ERISA".

Thus following "The Letter", and "throughout" the remaining portion of the two year limitations period, the Employer did by word and deed (in violation of ERISA Sec. 511/Coercive Interference):

> *"***through the use of fraud***restrain***beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under***this title (ERISA)***"* (Appendix p101).

Fraud, and fraudulent concealment, under Texas law may give rise to the Discovery Rule, with fraudulent concealment taking the cause of action out of the bar of limitations. *Lulling Oil & Gas Co. v. Humble Oil &* Refining Co., 191 SW 2d 716, 723, *Shipp v. O'Dowd,* 454 SW2d 845, 847 (Tex. CA 1970).

> The duty to exercise reasonable diligence to discover alleged fraud may be affected by the other party's fraudulent concealment of the fraud. *Dotson v. Alamo Funeral Home,* 557 SW2d 308 (CA San Antonio 1979). *Parker, supra.*

The Texas courts have held:

> *Any* statement, word, or act that tends to the suppression of

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See also 60A Am. Jur. 1223, citing cases (cause of action begins to accrue when the benefit is denied not when the *action* that was the basis of the denial occurred). Here that "action" would be plaintiff's discharge.

the truth may be sufficient to render the concealment fraudulent. 50 *Tex. Jur.* 3rd 124, N95, P560; *Texas Harvester Co. v. Wilson,* 210 SW 574.

At common law, the word "fraud" refers to an act, omission, or concealment in breach of legal duty, trust, or confidence justly imposed, when breach causes injury to another or taking of undue and *unconscientious advantage (Chein, supra).*

Appellant has shown far more than *Matsushita's* mere "metaphysical doubt" as to *(fraudulent concealment)* material facts. The "record taken as a whole" could only lead a rational trier of fact to find *against* the moving party on the Discovery Rule. *Matsushita v. Zenith,* 475 US 574, at 586-587.

The savings, for Commercial Credit as distinguished from the Plan,, from discharging Beneficiary (for the "purpose of interfering") and withholding their intentions until limitations barred him were enormous! A substantial portion of the benefits came out of the corporations "general assets" not those of the Plan. See Appendix p88.

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8. (a) When one or more Federal Circuit's ***(as in the 5th Circuits Clark v. Resistoflex)*** consistently dismiss ***premature*** Sec. 510, Part #2, action's at ***any*** point in time when "***it is undisputed that no benefit will be forfeited by reason of (the) discharge***",

should not the court liberally apply the discovery rule when a subsequent, postlimitations, discharge-based "forfeiture" is declared?

(b) May the Court of Appeals, by summary judgment, consistently treat "state of mind" issues for ERISA litigants disparately (as in *Clark)* vis a vis *"state of mind"* issues of *non*-ERISA litigants *(International Shortstop v. Rally's)*?

In *Mass. Mutual. v. Russell,* supra at 106, the Supreme Court characterized the civil enforcement provisions of Sec. 502(a) as "carefully integrated", as a "interlocking, interrelated and inter-dependent remedial scheme, which is in turn part of a comprehensive and reticulated statute", and further stated "we are reluctant to tamper with an enforcement scheme crafted with such evident care".

The Congress has charged the courts that "it was also intended that a body of Federal substantive law to deal with issues involving rights and obligations under private welfare and pensions plans" *(Mass. Mut. v. Russell,* supra, at 112). That body of law should then be no less "carefully integrated, interlocking, interrelated, interdependent, comprehensive, and crafted with such evident care" than the legislation itself.

When a beneficiary reasonably rely's upon such a decision *(Clark, Turner, and their genre)* as barring his Sec. 510 claim

because of prematurity, the courts must be very careful to balance such a decision by generously applied discovery doctrines.

Lacking such balance ERISA beneficiary's Due Process rights are seriously jeopardized. Unscrupulous employers, in reliance upon such ill conceived case law, will continue to delay their "purpose", to utilize a discharge-based reason for denial of benefits, until the beneficiary is barred by limitations.

Neither the 3rd Circuit's *Galvik.v. Continental Can Co.*, 812 F2d 834, nor the 2nd Circuit's *Zipf*, impose such a severe, *threshold*, "must-show-forfeiture", doctrine as the 5th Circuit does in *Clark*.

An ERISA beneficiary is not then so greatly burdened in those circuits, and discovery rule requirements for plaintiff's might be made more stringent (*Galvik*):

> To be certain the broad remedial objective of 510 do not authorize sanctions merely for an employers state of mind. There must be *some* act in furtherance of an employee desire to interfere with an employees rights to pension benefits. That act, however, need not achieve the employers illicit goals. To *keep the effects of discriminatory intent "in the air"* so to speak is part of 510's raison d'etre. The statute prohibits specific conduct for the "purpose". Thus actual deprivation is not a prerequisite to liability. The challenged

act *need not have* caused actual deprivation or have *actually interfered with the attainment of pension* liability (contrast with *Clark).*

The 5th Circuit, as do several of the Circuits, appear to treat with striking disparity, ERISA *interference* cases *viv-a-vis* non-ERISA offenses for summary judgment purposes. In *International Shortstop v. Rally's*, 939 F2d 1257, 1265 (1991), a *non-ERISA* case, it was held that when state of mind is an "*essential element* (the "material" element of *Clark)* of the nonmoving parties claim***(*such)* is inherently a question of fact which turns on credibility***we have repeatedly emphasized***not well suited for summary judgment". That opinion *a most exhaustive* treatise on "state of mind" law, but illustrates again the panel-to-panel differences within the 5th Circuit.

Yet whether Appellant truly succumbed to Respondents fraudulent words and actions (*at any time*, before or after "The Letter", but prior to expiration of limitations) so that he was detered from filing his action timely, is clearly a state of mind issue.

Further said the *International* court "questions of intent***are usually inappropriate for***summary judgment (citing *National Union Fire Ins. Co. Turtur*, 892 F2d 199 (2d Cir. 1989)). The general rule is that summary judgment is *seldom* appropriate in cases wherein particular states of mind are *decisive elements* of a *claim or*

defense. *Wilson v. Seiter*, 893 F2d 861, 866 (6th Cir. 1990) (compare *Clark*). This is so because it is particularly difficult for the nonmoving party to challenge the 'self serving' testimony of the moving party without the benefit of trial (*International*, at 1265; *60 Ivy Street Corp v. Alexander*, 822 F2d 1432 (6th Cir. 1989)).

Even so, the 5th Circuit affirmed dismissal, over Plaintiff's protest that the predenial "state of mind", of both Plaintiff and Defendant, met *International's* "essential element" criteria. That is, (a) whether Commercial Credit discharged with "purpose to interfere", (b) whether they withheld their *"purpose"* (the "fraud" of Sec. 511) of intent to interfere until Plaintiff was barred by limitations, and (c) whether Plaintiff succumbed to that fraudulent conduct, particularly (d) in view of the well documented "biased against self" characteristics of his psychological depression.

All are "state of mind" issues of the *essential nature* addressed by the 5th Circuit in *International* and unsuitable for summary judgment.

End of

Reasons for Granting the Writ

Respectfully submitted,

JAMES W. GREEN, pro se
3917 Twin Falls
Irving, TX 75062
(214) 255-7650

STATEMENT REGARDING SERVICE

Service was had by one of Rule 39's approved methods upon:

Gary B. Lawson, Esq. State Bar No. 18387790
Counsel of Record for Respondents (Commercial Credit Corporation, Commercial Credit Company, and Primerica Disability Income Plan)
Lawson & Fields, P.C.
5323 Spring Valley Road, Suite 300
Dallas, TX 75240
(214) 661-5323
(214) 661-51777 (FAX)

Proof of Service complying with Rule #29 will "accompany the document*** seperate from it", which Proof will reflect the date and method of service.

APPENDIX

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Rule 14(k)(i)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1496

Summary Calendar

JAMES W. GREEN, Plaintiff-Appellant,

versus

PRIMERICA DISABILITY

INCOME PLAN, ET AL., Defendants-Appellees

Appeal from the United States District Court

For the Northern District of Texas

(CA 3-91-2726-T)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:

James W. Green appeals an adverse summary judgment, the substitution of defendants, and the transfer of his case to another district judge. We affirm in part and vacate and remand in part.

Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well settled principles of law imposes needless expense on the public and burdens on the legal profession". Pursuant to that Rule, the Court has determined that this opinion should not be published.

-Page 1-

Background

In August 1987 while employed by Gulf Insurance Co., Green suffered a retinal hemorrhage which left him blind in this right eye. This allegedly was caused by a work-related lifting accident. Shortly thereafter Gulf terminated Green, citing his poor performance. Green obtained alternative employment which lasted approximately two years *(Footnote 1. Green admits that he did not disclose to his new employer either his visual impairment or his pre-existing hearing*

impairment. He eventually was terminated for unsatisfactory work performance). During that time Green communicated with Gulf regarding his eligibility for long term disability benefits under the Gulf plan. His application was denied on the grounds that his coverage under the plan had terminated when he was dismissed by Gulf.

In September 1989, Green filed an action against Gulf which, after several amended complaints, alleged discharge in violation of ERISA § 510 and asserting state tort and contract claims. That action was dismissed as time-barred.

Green, proceeding pro se, filed the instant action against Commercial Credit Company (as owner of its subsidiary Gulf), Commercial Credit Corporation (as owner, in turn, of Commercial Credit Company), and John Hsu, trustee of Gulf's employee benefits plan. The case was assigned to Judge Solis, but at the defendants request was transferred to Judge Maloney who had presided in the prior litigation.

While working for Gulf, Green was covered by an employee benefits program entitled "Disability Income Program" (herinafter "the Plan"), sponsored by Commercial Credit Company. Primerica Disability Income Plzan is successor-in-interest to the Commercial Credit Company plan. Over Green's objection, Primerica sought and

was granted leave to be substituted for the Commercial Credit defendants. The district court then granted summary judgment in favor of Primerica, finding Green's section 510 claims time-barred.

Green appeals the adverse summary judgment, the order substituting Primerica as defendant, and the order transferring the case to Judge Maloney; in addition, Green seeks attorney's fees on appeal.

Analysis

The Section 510 Claim

ERISA sec 510 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exerising ay right to which he is entitled under the provisions of an employee benefit plan [or] this title***or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this title*** *(Footnote 2. 29 USC § 1140).*

The provisions of section 510 are enforceable under 11 USC

§ 1132 *(Footnote. Id).*

1. The proper defendant.

Green contends that the district court erred in permitting Primerica to be substituted for the Commercial Credit defendants. Green brought his section 510 claim against the Commercial Credit defendants in their capacities as owner of his former employer, Gulf, not in their capacities as sponsors or administrators of the Plan. An ERISA plan is not a proper defendant for a section 510 claim *(Footnote 4. Swanson v. U.A. Local 13 Pension Plan, 779 S. Supp. 690 (E.D.N.Y.) (plan not subject to section 510 claim because not within ERISA definition of "person"), aff'd without op., 953 F2d 636 (2d Cir. 1991); Adams v. Koppers Co., 684 F. Supp. 399 (W.D. Pa.)* _____*v.* _____, ___*F. Supp. 111 (E.D. La. 1988)(Sec 510 not intended to apply to non-employer).* Presumeably Primerica succeeded only to the functions of Commercial Credit Company in its capacity as administrator of the Plan and substitution in that capacity was proper. The district court erred, however, in substituting Primerica as the defendant on the section 510 claim which was not brought against the Plan. Thus, Commercial credit Company and Commercial Credit Corporation must be reinstated as party defendants to the section 510 claim.

2. The limitations period.

Having determined that the Commercial Credit defendants must be reinstated we find the section 501 claims against them time-barred.

We review summary judgments *de novo*, applying the same standards as the district court *(Footnote 5. Texas Refrigeration Supply, Inc. v. FDIC, 953 F2d 975 (5th Cir. 1992).* We will affirm a grant of summary judgment if we find a basis, independent or not of the district court's reasoning, adequate to support the result. We may affirm even in situations in which the district court's ruling was incorrect, as long as the result was proper *(Footnote 6. Id. at 980 (citing Degan v. Ford Motor Company, 869 F2d 889, 892 (5th Cir. 1989)).* In this case we find that the result—summary judgment in favor of the defendants on the section 510 claim—was proper.

We have held that, in Texas, an ERISA section 510 claim is subject to a two-year statute of limitations *(Footnote 7. McClure v. Zoecon, Inc., 936 F2d 7778 (5th Cir. 1991).* Green was notified of his termination from Gulf on September 2, September 2, 1987 and the termination was effective as of October 31, 1987. Green did not bring the instant ERISA suit until December 13, 1991, more than two years after his termination.

Green contends that we should aply a discovery rule in determining when his section 510 claim accrued. Green claims that he was not aware that he was terminated to avoid payment of ERISA benefits until more than two years after his termination, at which time he was informed that his application for benefits would be denied based upon

that termination. He contends that throughout the limitations period Commercial Credit Company led him to believe

that his benefits claim still could be considered on the merits, thereby preventing his discovery of the improper cause for his termination. Althought at first blush the argument appears compelling, a close look at the record proves it to be without merit. As early as September 14, 1987, in a letter to Gulf's vice president, O.L. Ayers, Green claimed a wrongful discharge. In this letter, he states:

> The chronology of the events which led to my discharge might be the most lucid way of treating the problem, because a pattern of conduct is thus more apparent, which will permit a jury to find (no matter Gulf's protests) that I was discharged at least in part for insisting upon my rights to certain benefits (I note parenthetically that the employees handbook grants that 'no one, including your employer or any other person, against you in any way to prevent you from exercising your rights under ERISA [']*[emphasis in original]*.

Accordingly, the district court properly found the section 510 claim time-barred. We therefore render judgment on that claim in favor of the reinstated Commercial Credit defendants *(Footnote 8. Green also contends that the Commercial Credit defendants are estopped*

from asserting the limitations defense in this lawsuit because they controlled Gulf's defense in the prior lawsuit but failed to assert that defense on their own behalf. This argument is wholly without merit.).

The Section 502 Claim

Green also claims that he raised a claim under ERISA section 502(a)(1)(B) to recover benefits under the Plan *(Footnote 9. "A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the Plan, or to clarify his rights to future benefits under the terms of the plan")* and that the

district court either ignored this claim or erroneously applied the two-year limitations period. The defendants, on the other hand, contend that Green failed to raise this claim in the district court because the initial paragraph of his complaint states: "This action arises under Section 510 of the Employees Retirement Income Security Act, 29 USC §§ 1132 and 1140".

A pro se litigant's pleadings are to be liberally construed *(Footnote 10. Haines v. Kerner, 404 U.S. 519 (1972).* So construed, we find the district court erred in failing to recognize Green's claim for benefits. First, in his initial complaint, Green asserts that "[t]he

failure and refusal of John Hsu, Trustee, to extend disability benefits to Plaintiff was wrongful, and plaintiff has standing to sue for the benefits so denied pursuant to 29 USC § 1132." In response to the defendants motion for summary judgment, Green again pointed out that he was making a claim for benefits from the plan *(Footnote 11. In that response, Green incorrectly cites section 502(a)(1)(A), but quotes the language of Section 502(a)(1)(B). In addition he notes that contractual benefits are "the only benefit Plaintiff seeks from the Plan.").*

A cause of action under section 5023(a)(1)(B) accrues when the application for benefits is denied *(Footnote 12. Hogan v. Kraft Foods, 969 F2d 142 F2d 141 (5th Cir. 1992); Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc., 637 F2d 357 (5th Cir.), cert. denied, 454 U.S. 836 (1981).* In Texas such claims are

governed by the four-year limitations period for contract actions. *(Footnote 13. Hogan).* Green's application for benefits was denied on July 15, 1990; thus his claim for benefits was not time-barred. We must vacate the summary judgment as to the section 502(a)(1)(B) claim and remand for its consideration *(Footnote 14. As to this claim, Primerica is a properly substituted defendant for Commercial*

Credit Company in its capacity as plan administrator).

Transfer to Judge Maloney

Green contends that the court erred in transferring his case from Judge Solis to Judge Maloney. Cases may be transferred from one judge to another for the expeditious administration of justice *(Footnote 15. United States v. Stone, 411 F2d 597 (5th Cir. 1969); 28 USC § 137).* Chief Judge Sanders transferred the case to Judge Maloney, who was familiar with the issues presented because he had presided over Green's prior suit. We find neither error nor abuse of discretion in that adminstrative action *(Footnote 16. He also contends that Judge Sanders granted the Defendants request to transfer the case to Judge Maloney without providing him with an opportunity to respond as required by the local rules. This argument is not supported by the record—before the transfer was made, Green submitted his written objection thereto).*

Attorney's Fees

Green requests that, as a sanction against the defendants, we award him attorney's fees. ERISA permits a court, in its discretion, to award attorney's fees to a prevailing party on appeal. This does not extend to non-attorney pro se litigants *(Footnote 17. (See McLean v. International Harvester Co., 902 F2d 372 (5th Cir. 1990)).*

For the foregoing reasons we VACATE IN PART the district courts order substituting Primerica Disability Income Plan as the sole defendant in this matter and REINSTATE Commercial Credit Company and Commercial Credit Corporation as defendants with respect to Green's section 510 claim; we RENDER summary judgment in favor of the Commercial Credit defendants on the section 510 claim; we VACATE and REMAND for consideration of Green's claims under section 5023(a)(1)(B); and AFFIRM the district court in all other respects.

-Page 9-

U.S. COURT OF APPEALS

FILED

June 28, 1993

RICHARD E. WINDHORST, JR, Clerk

THE DISTRICT COURT PROCEEDINGS

Rule 14(k)(ii)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAMES W. GREEN, Plaintiff

v. CA 3-91-2726-T

PRIMERICA DISABILITY INCOME

PLAN, et al., Defendents

ORDER GRANTING DEFENDANT'S MOTION

FOR SUMMARY JUDGMENT

This action is before the court on Defendant Primerica Disability Income Plan's April 10, 1992 Motion for Summary Judgment. After considering the motion, response, the summary judgment evidence and the applicable legal authorities, the court concludes that the motion should be granted.

Pro se Plaintiff commenced this action on December 13, 1991, alleging that he had been wrongfully terminated from employment with Gulf Insurance Company in violation of § 510 of the Employee Retirement Income Security act of 1974, 29 USC § 1001, et seq. Plaintiff has previously asserted an identical claim for relief in an action styled James Green v. Gulf Life insurance Company, CA 3-90-0773-T.

By order dated October 16, 1991 this court dismissed that action, concluding that Plaintiff's claim was barred by the applicable two year

statute of limitations. See McClure v. Zeocon, Inc.,

936 F2d 777 (5th Cir. 1991). Plaintiff's claim in this action is similarly barred by limitations and will be dismissed. Primeirca's motion for sanctions and for injunctive relief will be denied.

It is therefore ORDERED that Primerica Disability Income Plan's April 10, 1992 Motion for Summary Judgment is granted.

It is further ORDERED that Primerica Disability Income Plan's April 10, 1992 Motion for Sanctions and Injunctive Relief is denied.

It is further ORDERED that this action is dismissed with prejudice.

Signed this 1st day of May, 1992.

/s/ *Robert B. Maloney*

ROBERT B. MALONEY,

U.S. DISTRICT JUDGE

U.S. DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

FILED MAY 5, 1992

NANCY DOHERTY, CLERK

ORDER ON

THE MOTION FOR REHEARING WITH

THE COURT OF APPEALS

Rule 14(k)(iii)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1496

JAMES W. GREEN, Plaintiff-Appellant,

versus

PRIMERICA DISABILITY

INCOME PLAN, ET AL., Defendants-Appellees

Appeal from the United States District Court

For the Northern District of Texas

ON PETITION FOR REHEARING

(August 12, 1993)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges.

PER CURIAM;

IT IS ORDERED that the petition for reharing filed above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT

/S/ Henry A. Politz CHIEF JUDGE

US COURT OF APPEALS

FILED

August 12, 1993

RICHARD E. WINDHORST, JR, CLERK

THE STATUTES, AND RULES OF COURT INVOLVED

Rule 14(f)

The Employee Retirement Income Security Act of 1974 (ERISA), the Federal Rules of Civil Procedure (FRCP), and the Rules of the Supreme Court of the United States, are indeed "lengthy" (Rule 14[f]). The portions that are germane to these questions, however,

are relatively brief.

Excerpting those portions should only help clarify the issues. Certainly Respondent will challenge these excerpts if the slightest potential for misinterpretation portends.

With the Court's indulgence, in view of the Rules 14(f)'s exceptions, Appellant will then set forth only that which appears to be the "pertinent text" in this appendix.

The Rule's of the Supreme Court of the United States

Rule 10

Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right but of judicial discretion. ***will be granted only when there are special and important reasons***. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another***on the same subject matter; ***or has so far departed from the accepted and usual course of judicial

proceedings, or sanctioned such a departure by a lower court, so as to call for an exercise of this Court's power of supervision.

***

(c) When a***United States court of appeals has decided an important question of federal law, which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflict with applicable decisions of this Court.

Rule14

Content of the Petition for a Writ of Certiorari

.1. The petition for a writ of certiorari shall contain***

***

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point and their pertinent text must be set forth in the appendix referred to in subparagraph .1(k) of this Rule.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter***which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery, or the claim or defense of any other party***. ***It shall not be ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

***

Rule 36. REQUESTS FOR ADMISSION

(a) Request for Admission. A Party may serve upon any

other party a written request for admission***of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application law to fact, including the genuineness of any documents described in the request***.

***

The matter is admitted unless, within 30 days after service of the requeststhe party to whom the request is directed serves upon the party requesting the admission a written answer or objection***.

***

(b) Effect of Admissions. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or admendment of the admission***when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action***on the merits***.

Rule 56. SUMMARY JUDGMENT

***

(b) For Defending Party. A party against whom a claim***is sought may, at any time, move without or without supporting affidavits for a summary judgment***.

(c) Motion and Proceedings Thereon. ***The adverse party***may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings***answers to interrogatories, and admissions on file***show there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law***.

***

(e) ***Defense Required. ***an adverse party may not rest upon the mere allegations***of the adverse party's pleading, but the adverse party's response, by affidavits, or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial***.

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 [29 USCS §§ 1001] et seq

---

§ 1002. Definitions

For purposes of this title:

***

(7) The term "participant" means any employee or former employee of an employer***who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer***.

---

§ 1113. Limitation of actions

No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part***after the earlier of—

(1) six years (A) after the date of the last action which constituted a part of the breach or violation, or (B) in the case of an ommission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

---

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

***

(B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

***

(3) by a participant***

(B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

---

§ 1133. Claim procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant who claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

---

§1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter***or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter***. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

---

§ 1141. Coercive interference

It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, this title, sec 3001 [29 USCS § 1201] or the Welfare and

Pension Plans Disclosure Act. Any person who willfully violates this section shall be fined $10,000, or imprisoned for not more than one year, or both. (Sept. 2, 1974, {.L. 93-406, Title I, Subtitle B, Part 5, § 511. 99 Stat. 905.)

OTHER APPENDED MATERIAL

Rule 14(k)(v)

EXCERPTS FROM

ORIGINAL COMPLAINT

Page 2

Plaintiff believes, and has reason to believe, that the reason given for the discharge was pretextual, and that the true purpose was to deprive him of the substantial and costly benefits to which he would otherwise have been entitled****.

Page 3

****both these defendants bore, and continue to bear a fiduciary duty to the Plaintiff****.

Page 4

These references to procedural matters *(in the Defendants letters of March 25 and April 7, 1988)* had their intended effect of leading Plaintiff to believe that his claim would considered on its merits. In fact, as later

became apparent, there was no intention to consider the claim on its merits, and the references to procedure were calculated to conceal fraudulently Defendents true intention of ultimately denying the claim on the basis of Plaintiff's employment status.

Page 5

Plaintiff reasonably believes that the Defendants withheld their intention of denying Plaintiff's claim in order to permit the limitations period to run against the assertion of such claim.

Page 6

****one or the other, or both, are liable in a fiduciary capacity to the Plaintiff for the benefits wrongfully denied.

EXCERPTS FROM

PLAINTIFFS RESPONSE TO DEFENDANTS MOTION TO SUBSTITUTE PARTY DEFENDANT

Page 2

Discharge served not the Plan, but Commercial Credits seperate interests. Commercial Credit—not the Plan—was obliged to pay 100% of the costs of Plaintiff's life, dental and health insurance for 15 years until normal retirement age at 65 *out of general funds*. For the same period they were obliged to contribute to plaintiff's retirement fund, and to pay such benefits from age 65 until death. Further Art. 8.5 of the Plana compells Commercial Credit to make up 100% of any shortfall in Plana funding

from its own assets should the Plan's assets become impaired or exhausted by payment of claims. While plaintiff has not ammended his complaint to seek contractually based sick pay benefits of $24,307.25 *(though such is included in the "Disability Income Program" for which he sues)* Commercial Credit is obligated to pay such out of general funds—not the Plan. These liabilities, totally seperate from the Plans liabilities are prospectively well in excess of $100,000. Since many of Commercial Credits obligations were not triggered until benefits entitlement was established under the Plan there existed an enormous incentive for them to discharge Plaintiff for "the purpose of interfering with the attainment of any right under the Plan or this Title".

EXCERPTS FROM PLAINTIFF'S RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT, ETC.

Page 1

Defendants adduce not proof or case law controverting plaintiff;s pleadings, that acting as a fiduciary, defendant fraudulently concealed material facts and thus this cause of action. Under the "discovery rule" the statute does not begin to run until plaintiff discovers those facts.

Page 3

ERISA 510 (29 USC 1140) charges "any person" (but not the Plan) with two distinct, freestanding prohibitions. Both proscribe "discharge or discrimination" for either 1) "exercising any right to which (one) is

entitled", or seperately 2) "for the purpose of interfering with the attainment of any right to which (one) may become entitled under the Plan or this title". The first seeks to penalize the exercise of rights without attempting to defeat those rights. The second attempts to defeat rights with the primary intent to punish. That a violation of the first might arguably be deduced in a given circumstance does not bar action for a much delayed revelation of a purpose to defeat those rights. Such may only manifest itself in repudiation of benefits long after the wrongful discharge. The 5th Circuit in Clark v. Resistoflex, 854 F2d 761 (1988) in effect made such repudiation the sole satisfactory proof such purpose.

Page 4

On February 18th, and again February 20, 1992, plaintiff served upon defendants counsel of record Requests for admissions under FRCP 36. The 30 days prescribed has passed and no response nor objections filed. Under subsection (b) such are "conclusively established". Notations in the margin *(the admissions were attached as an Appendix)* will refer to the admissions on which plaintiff relies.

Page 4

Commercial Credit wrote plaintiff two letters very early after Plaintiff's blindness and subsequent termination. The first recited:

> ****you were sent***the Plan Booklet and Disability Claim form you were informed that you, your manager and your physician must complete***and return. As you did not****it became*

impossible to decide whether you were or were not eligible

for short term disability and then long term disability benefits".

As those very words were being uttered Commercial credit *knew* that when claim was made his entitlement to benefits would be repudiated —not on the basis of medical reports either supporting or ruling out disability—but SOLELY on the basis that, as a consequence of his firing, he had lost employee status. Those letters could only be interpreted as an intent to extend benefits, or at minimum to judge on their merits claims made in the future. "*Impossible to decide*"? The decision had already been made!

Both letters were in direct response to letters from Plaintiff asking for specific commitments on benefits.

EXCERPTS FROM

BRIEF FOR THE APPELLANT

Page 15

(Plaintiff's) ability to know prelimitations of defendants intended "purpose" was undeniably a "state of mind". That is particularly so when as here plaintiff has made an offer of proof that he was, from the time of his loss of sight, seriously psychologically depressed. Medical literature presented showed loss of vision can have a *"potentially devastating effect"*

on the patient. Other treatises showed that in depression "thoughts are

distorted by***hopeless despair, concentration is difficult***even when the torment subsides mental processes remain slow, memory dwindles and thinking disintegrates***".

Page 16

But defendants intent also involves a "state of mind" issue. Says *International Shortstop* (1266, 1267):

> Questions of intent we note are usually inappropriate for *** summary judgment***the court must be vigilant to draw every reasonable inference from the evidence in the record in a light most flattering to the nonmoving party. Of course evidence probative of the moving party's state of mind may be more difficult to procure because it is typically is held in the exclusive possession of the moving party.

Page 23

It must be stressed that ERISA prohibits both discharge and discrimination. Even assuming that plaintiff's discharge was not for the purpose of interfering with the attainment of benefits Commercial credit as Plan Administrator can still be held liable for utilizing that discharge to discriminate among present vis a vis "former" meployees. Both are "participants" as defined by (ERISA).

There is no evidence in the record demonstrating a manifest act of discrimination prior to denial of benefits *(which the Court of Appeals subsequently found to be July 15, 1990).*

Properly the court should have denied the Defendants Motion to Stay Discovery. They should have ordered defendant to cooperate in that discovery, and specifically to produce a copy of the disputed plan. In International Shortstop, supra at 1266 the 5th Circuit stated:

> The nonmoving party's failure to tailor its request for additional discovery to fit Rule 56(f)'s precise measurements does not necessarilly forclose the courts consideration of the request***so long as the nonmoving party indicates to the court by some equivilent statement preferably in writing of its need for additional discovery the nonmoving party is deemed to have invoked the rule. When the party opposing the summary judgment informs the court that its diligent efforts to obtain evidence from the moving party have unsucessful a continuance***for purposes of discovery should be granted almost as a matter of course. The Supreme Court has itself cautioned against granting summary judgment prematurely***where nonmoving party has not had the opportunity to discovery information that is essential to his opposition.

EXCERPTS FROM

BRIEF OF APPELLEE PRIMERICA

Page 17-18

In his Response to the Plan's Motion for Summary Judgment Green relies upon the purported "admissions" of the Plan. In the admissions, Green attempts to raise the discovery rule as an excuse for his failure to file his Complaint within the two years of his discharge from Gulf. The admissions were never answered by the Plan nor does the Plan even acknowledge receipt of the admissions. Green does not submit copies of any certified mail "green" cards or other correspondence reflecting service on or receipt of the admissions by Commercial Credit. In fact the Plan specifically denies receipt of those purported admissions in its motion for Leave to File Reply Brief (R.I. 133). It is also interesting to note that Green failed to send out via certified mail his first set of interrogatories and admissions, *he did in fact* send certified mail Plaintiff's Second set of Interrogatories. requests for Admissions and Request for Production of Documents to Defendent. (R.I. 062).

Accordingly, it appears that *the Trial Court did not rely upon or consider these* purported *admissions* which were never properly served upon the Plan *(Appellants's emphasis throughout)*.

EXCERPTS FROM

MOTION FOR PANEL REHEARING

IN THE 5TH CIRCUIT COURT OF APPEAL

(Pages 1 thru 3)

In its ANALYSIS the court cited Sec. 510 *(here recited in salient part):*

> It shall be unlawful to***discharge***(*discipline, discriminate against, etc.)* a participant***for exercising any right***or (or, **or!**) for the purpose of interfering with the attainment of any right****.

The Congress sought then to constrain two distinct forms of conduct (or "purposes" if you will). These are seprable, individually actionable prohibitions. Only secondarily did *(the Congress)* prohibit the mechanisms by which those purposes might be carried out.

"Discharge" is not then action able unless it coupled with one of those "purposes" *(the 5th Circuits Clark decision, discussed later, would say that the benefits must actually have been "forfeited" as well).*

Plaintiff's Response to Defendants Motion for Summary Judgment examined that point carefully (Record Excerpts #13-P3).

The offense the court *(of appeals)* has seized upon has commonly been termed "retaliation" in workers compensation law. The workers discharge can have no effect on his entitlement to benefits under that statute.

That for which Plaintiff sues, however, is interference:

> "Plaintiff believes***that the reasons given for the discharge were pretextual, and that the true purpose was to deprive him of** benefits *(Complaint-*

Record Excerpt #13-P2-invoking Sec. 510).

Plaintiff reasonably believes that the Defendant withheld their intentions of denying Plaintiffs claim in order to permit the limitations period to run*** *(P5-invoking Sec. 511)*"

Retaliation seeks to punish the act of "exercising ***rights". Standing alone it's aim is not to deprive the participant of those rights.

Interference on the other hand has as its "purpose" *(purpose being the sole statutory determinant)* "interference with the attainment of any right". While it may inflict punishment as an ancillary effect that is not the "purpose" the Congress sought to constrain.

The only features the two have in common are the prohibited mechanism's of discharge, discrimination, etc. by which those *separate* "purposes" are accomplished.

The offenses are not one and the same, as the court seems to have perceived, and the existence of one is not necessarily evidence of the existence of the other.

STATEMENT REGARDING SERVICE

Service was had by one of Rule 39's approved methods upon:

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Proof of Service complying with Rule #29 will "accompany the document*** seperate from it", which Proof will reflect the date and method of service.

End of Petition for Writ of Certiori